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IN THE

Supreme Court of the United States

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Petitioner,

- v.

RANDAL S. BRAGG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a creditor must satisfy disclosure obligations under the Truth in Lending Act with respect to a conditional credit transaction to which the consumer was not contractually obligated under state law when applicable regulations of the Federal Reserve Board require only that the creditor "shall make disclosures before *consummation* of the transaction," defined to be "the time that a consumer becomes *contractually obligated* on a credit transaction," and Staff Commentary provides that *state law* should govern when the consumer becomes contractually obligated to a credit transaction.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Randal Bragg, Robert Crabtree, Christopher E. Nichols, Bond Nichols, Nonie Stebbins, Andre Reichert, Donald E. Stebbins, John E. Cone, Bill Heard Chevrolet, Inc.-Plant City, Affiliated Financial Corporation, Triad Financial Corporation, and WFS Financial, Inc. Petitioner Bill Heard Chevrolet, Inc.-Plant City states, pursuant to Supreme Court Rule 29.6, that its parent corporation is Bill Heard Enterprises.

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PETITION FOR A WRIT OF CERTIORARI

Bill Heard Chevrolet, Inc.-Plant City ("Bill Heard Chevrolet"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on June 25, 2004 and is reported at 374 F.3d 1060 (11th Cir. 2004) (Pet. App. 1a-14a). This petition was timely filed on September 23, 2004.

The Order of the United States District Court for the Middle District of Florida granting in part Bill Heard Chevrolet motion to dismiss was issued on January 24, 2003 and is unreported (Pet. App. 22a-36a). The Order of the

district court denying Plaintiffs' motion for rehearing was issued February 14, 2003 and is reported at 245 F. Supp. 2d 1235 (M.D. Fla. 2003) (Pet. App. 15a-21a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was issued on June 25, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE, REGULATIONS, AND STAFF COMMENTARY INVOLVED

Section 1638(b)(1) of the Truth in Lending Act (TILA), 15 U.S.C. § 1638(b)(1), provides that:

> (b) Form and timing of disclosures; residential mortgage transaction requirements (1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

12 C.F.R. § 226.17 reads, in pertinent part, as follows:

> (b) Time of disclosures. The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in Sec. 226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in Sec. 226.19(b) and Sec. 226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

12 C.F.R. § 226.2(a) reads, in pertinent part, as follows:

> (13) Consummation means the time that a consumer becomes contractually obligated on a credit transaction.

12 C.F.R. § 226, Official Staff Commentary 2(a)(13) provides:

> 1. State law governs. When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.
>
> 2. Credit v. sale. Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may also be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

STATEMENT

A. Statutory Background

Congress enacted the Truth in Lending Act (TILA) in 1968, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601 *et seq.*), to address concerns about deceptive credit practices. TILA is a consumer protection statute designed to protect consumers from contracting for financing without proper

disclosure of fees, rates, and other information. *See* 15 U.S.C. § 1601, *et seq.* TILA's purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a).

Although TILA applies to a broad range of consumer credit transactions, the statute's disclosure obligations arise only in discrete circumstances. Under TILA, the obligation to make the required disclosures applies "before the credit is extended." 15 U.S.C. § 1638(b)(1). This statement has been illuminated by Regulation Z, which was adopted by the Federal Reserve Board in support of TILA. 12 C.F.R. § 226. Regulation Z states that "[t]he creditor shall make disclo sures before consummation of the transaction." 12 C.F.R. § 226.17. Consummation is defined by Regulation Z as follows: "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). The Official Staff Commentary to that definition explains that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13).

In contrast to the current definition of consummation under TILA and Regulation Z, the definition of consummation prior to 1982 was starkly different. Previous staff interpretations had acknowledged an economic coercion test, whereas the new Regulation Z focused upon the time at which a consumer becomes contractually obligated on a credit transaction. Under the prior version of Regulation Z, consummation was defined as the time "when a creditor agrees to extend credit and the customer agrees to utilize that credit." 12 C.F.R. § 226.2 (kk)(1982). The current definition of consummation has been characterized as a "significant departure" from the staff interpretations of the previous definition. 46 Fed. Reg.

20848, 20851 (Apr. 7, 1981). When issuing the new Regulation Z, the Federal Reserve Board explained as follows:

> Consummation. This definition is based on § 226.2(kk) of the current regulation, which defines consummation in terms of the creation of a contractual relationship, and is the same as that in the December proposal. As before, state law determines when the contractual obligation arises, but the revised definition focuses on when the consumer becomes obligated.
>
> This definition is a significant departure from long-standing staff interpretations of the current regulation that had added the concept of "economic coercion" to the test of when consummation occurs. Under the revised definition, consummation occurs only when the consumer becomes contractually obligated on the credit transaction. The time at which a consumer becomes contractually obligated on a purchase does not determine when consummation occurs for Truth in Lending purposes, as long as there is no credit obligation. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a sales contract may have arisen. However, consummation for Truth in Lending purposes does not occur unless the consumer also contracts for financing at that time.

Id.

B. Proceedings Below

Facts

On September 28, 2001, Randal Bragg ("Mr. Bragg") signed various documents related to his potential purchase of a 2002 Silverado truck. 374 F.3d at 1062. He executed a standard purchase agreement, providing that Bill Heard Chevrolet retained title pending credit approval. *Id.* at 1063. The purchase agreement expressly provided that "Seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser,

provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." R-38-Exh. A-1. It further provided that, "neither party hereto shall be bound to the other until terms of credit have been approved by both parties." R-38-Exh. A-1.

At the same time, Mr. Bragg executed a bailment agreement that enabled him to take possession of the truck before the transaction was consummated. R-38-Exh. A-4. Under the bailment agreement, if financing was not obtained, the consumer had no purchase obligation and instead owed Bill Heard Chevrolet twenty cents per mile for "excessive mileage and use" (when mileage exceeds twenty miles per day) and for any damages to the vehicle. R-38-Exh. A-4. If financing were approved and the consumer received title to the truck, he would not be responsible for the rental fees under the bailment agreement that might otherwise be applicable. R-38-Exh. A-4. The bailment agreement expressly provided that the transaction was not complete unless Bill Heard Chevrolet "is able to provide Buyer(s) with financing according to the terms of the Sales Agreement . . . ." R-38-Exh. A-4.

Finally, Mr. Bragg signed two Florida Simple Interest Vehicle Retail Installment Sales Contracts. Each related to the same vehicle, but each contained a different rate of financing. One contained an annual percentage rate ("APR") of 14.50% and the other contained an APR of 14.65%. R-38-Exhs. A-3, A-4.

On October 1, 2001, Bill Heard Chevrolet contacted Mr. Bragg and notified him that it had been unable to obtain financing approval on the terms set forth in either of the Installment Sales Contracts he had signed but that other financing could be arranged. *See* 374 F.3d at 1062. Mr. Bragg then signed two new Installment Sales Contracts, agreeing that their effective date would be September 28, 2001, which

was the day he took delivery of his 2002 Silverado truck. *Id.* The new agreements differed from each other only with respect to the amount financed; Mr. Bragg purchased an extended service plan in one of the transactions, which increased the amount financed in one of the new Installment Sales Contracts. *Id.* The APR was the same in both. *Id.* Financing approval was obtained on October 5, 2001. *Id.*

Course of the Proceedings

Mr. Bragg brought suit alleging that Bill Heard Chevrolet violated TILA by failing to make statutory disclosures with respect to the initial two Installment Sales Contracts for which financing was never approved, and with respect to the Installment Sales Contract for which financing was approved. Significantly, the district court rejected Mr. Bragg's claims with respect to the final and indisputably consummated transaction, and that is not at issue at this time (that ruling also rejects any TILA claim as to the third Installment Sales Contract). What is at issue is whether Mr. Bragg stated a claim for TILA violations for the two Installment Sales Contracts plainly superceded by the final, consummated transaction.

The district court held that plaintiff did not state a claim with respect to the superceded transactions. Following the applicable regulations and the Official Staff Commentary interpreting those regulations, the district court looked to state law to determine whether Mr. Bragg had become contractually obligated under the documents he signed to go forward with the two, conditional Installment Sales Contracts. The district court concluded that, under Florida law, Mr. Bragg was not contractually bound to proceed on those terms. He was free to return the truck and abandon the transaction. Accordingly, the time had not passed by which Bill Heard was required under TILA to make appropriate disclosures, and it would not have violated TILA by failing to do so.

Based on this conclusion, the district court dismissed Mr. Bragg's complaint. The dismissal order provides in part:

> Defendant Bill Heard argues in its Motion to Dismiss that no TILA cause of action exists because Mr. Bragg and Crabtree never consummated a transaction with Bill Heard in which an alleged TILA violation occurred. In response, Mr. Bragg and Crabtree argue that a transaction was consummated for TILA purposes every time Mr. Bragg or Crabtree signed a purchase agreement or [Installment Sales Contract] regardless whether the purchase became completed. After careful consideration, this Court concludes that neither Mr. Bragg nor Crabtree consummated a transaction that contained an alleged TILA violation, and Bill Heard's Motion to Dismiss Plaintiffs' TILA claims should be granted.

(Pet. App. 28a).

Mr. Bragg filed a motion for rehearing, which the district court denied. 245 F. Supp. 2d 1235 (M.D. Fla. 2003). Mr. Bragg then appealed his case to the Eleventh Circuit.

The Eleventh Circuit reversed. 374 F.3d 1060 (11th Cir. 2004). In doing so, the Eleventh Circuit acknowledged that the Official Staff Commentary to Regulation Z says that state law should determine the point at which a consumer becomes contractually obligated to a credit agreement. Nevertheless, the Eleventh Circuit wrote:

> The specific content and timing of the disclosures are set forth in Regulation Z, which was adopted by the Federal Reserve Board in support of TILA. Regulation Z requires that the creditor disclose the identity of the creditor, the amount being financed, the annual percentage rate, the total sale price, and the total amount of payment. These disclosures must be made "before credit is extended," a point known as "consummation." "'Consummation' means the time that a consumer be comes contractually obligated on a credit transaction." We evaluate TILA transactions from the consumer's viewpoint.

> Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes"; that question is governed by federal law. [*Cody v. Cmty Loan Corp. of Richmond County*, 606 F.2d 499, 505 (5th Cir. 1979).][1]

374 F.3d at 1065-66. Thus, disregarding how Florida law would treat the transaction for purposes of determining the point at which a consumer becomes contractually obligated to a credit agreement, the Eleventh Circuit concluded by holding:

> Regardless of "the degree of commitment of the lender" contained in the agreements' condition precedent, Bragg's signature on these documents rendered him contractually obligated to the purchase of credit and thus constituted consummation for purposes of TILA disclosures. To give full effect to TILA's goal of providing meaningful and timely disclosure of important credit terms, we hold that in a financing agreement containing a condition precedent where the condition of obtaining financing is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract.

374 F.3d at 1068 (citations omitted).[2]

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[1] Notably, the *Cody* case was decided prior to the revision of Regulation Z in 1982.

[2] The Eleventh Circuit expressed some doubt about whether the Installment Sales Contracts should be read under Florida law to contain a condition precedent, but it declined to answer that legal question and instead assumed that such a condition precedent did exist.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DISREGARD FOR FLORIDA STATE CONTRACT LAW, IN THE FACE OF STAFF COMMENTARY DETERMINING THAT THE QUESTION WHEN CONSUMMATION OF A CREDIT TRANSACTION OCCURS IS CONTROLLED BY STATE LAW, CREATES A CONFLICT WITH THIS COURT'S RULING IN *FORD MOTOR CREDIT CO. V. MILHOLLIN*, 444 U.S. 555 (1980) THAT "*UNLESS DEMONSTRABLY IRRATIONAL*, FEDERAL RESERVE BOARD STAFF OPINIONS CONSTRUING THE ACT OR REGULATION SHOULD BE *DISPOSITIVE* . . . ."[3]

The conflict between the Eleventh Circuit's opinion and this Court's precedent can be stated very simply:

> In this case, the Eleventh Circuit's statement that "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes" is in conflict with this Court's determination in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. *Unless demonstrably irrational*, Federal Reserve Board staff opinions construing the Act or Regulation should be *dispositive* . . . ." (Emphasis supplied).

In *Milhollin*, this Court explained at great length the "unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." 444 U.S. at 567-68. Relying upon express provisions of TILA and its legislative history, the Court discerned "a

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[3] All emphasis is supplied unless otherwise noted.

decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation" and admonished that "[c]ourts should honor that congressional choice." *Id.* at 568. The Court accordingly deferred to Official Staff interpretation of TILA's disclosure obligations in that case.

Here, the district court correctly traced the analysis that governs the timing of required TILA disclosures. That analysis leads directly to the Official Staff Commentary (Reserve Board staff opinions), and from there to Florida contract law. Under TILA, the obligation to make the required disclosures is simply "before the credit is extended." 15 U.S.C. § 1638(b)(1). This statement has been illuminated by Regulation Z, which was adopted by the Federal Reserve Board to implement TILA. 12 C.F.R. § 226. Regulation Z states that "[t]he creditor shall make disclosures before consummation of the transaction." 12 C.F.R. § 226.17. Consummation is defined by Regulation Z as follows: "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). The Official Staff Commentary to that definition explains that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13).

With that as the analytical backdrop, the district court correctly determined:

> The Supreme Court has held that courts, like this Court, must grant great deference to the official staff commentary of Regulation Z. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 566 (1980). The official commentary on the definition of consummation indicates that state law, not Regulation Z, determines when a consumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13). Florida contract law construes

> contract clauses like those in this case to create a condition precedent to contract formation. *See Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla. 3d DCA 1958).

245 F. Supp. 2d at 1238 (footnote omitted).

This Court's directive in *Milhollin* to adhere to staff opinions in construing TILA, and the staff's position that state contract law controls the determination of consummation, are fatally undermined if the Eleventh Circuit is correct that the state law inquiry "has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes." *Indeed, inquiring into state law to determine when a consumer is contractually obligated on a credit transaction would be a futile exercise if it has no effect on the TILA's application to the credit transaction.*

The net effect of the Eleventh Circuit's opinion is that the Official Staff Commentary's directive that state law determines when consummation occurs is completely ineffectual. Further, the Eleventh Circuit declined to defer to the Official Staff Commentary without making the requisite determination that it was "demonstrably irrational." Nor could any such finding fairly be made. The staff's decision to rely upon state contract law in determining whether a contractual transaction has actually been consummated is patently reasonable. The Eleventh Circuit's decision thus cannot be squared with *Milhollin*, and the court's haste to supplant the staff's considered opinion about how to handle such issues with the court's own judgment about how best to protect consumers directly evokes this Court's concern that "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." 444 U.S. at 568.

Not only is there palpable conflict between the Eleventh Circuit's opinion and this Court's decision in *Milhollin*, but the case is important to product dealers and consumers

throughout the country. As the amicus will explain more fully, a trend in this direction could threaten the practice of spot delivery altogether. Spot delivery is a practice that allows consumers to drive their new vehicles off the car lots, including at times when lenders may not be open to approve financing. Obviously, such deals are often conditional in nature. Yet, a determination that federal common law deems such transactions to obligate the consumer on a credit transaction not only undermines the Official Staff Commentary's deference to state law, but also might change the availability of such conveniences to consumers.

It remains only to note that there is no need for the Eleventh Circuit's creation of federal contract common law in this case in order to fulfill the purposes of TILA. Mr. Bragg had rights under TILA with respect to the financing that was ultimately approved, but the district court rejected Mr. Bragg's challenge to the legal sufficiency of the dealer's TILA disclosures for this transaction, and that determination is not at issue here.

With respect to the deals that did not receive financing, there is no need to impose TILA disclosure requirements prior to the approval of financing (which is the time that the contractual condition is satisfied under Florida contract law). The dealership obviously runs the risk that financing will be approved and therefore will have an incentive to make sure that all disclosures are accurate. But, to allow a TILA claim on a conditional deal that never had financing approved creates a situation where a consumer could (as in this case) bring multiple TILA claims on a deal where only one vehicle was purchased. That is at odds with common sense and with the Official Staff Commentary's deference to state law in the interpretation of when a consumer becomes obligated on a credit transaction.

In the end, to the extent that the complaint contains allegations that a dealership intentionally "yo-yos" customers by

having them sign agreements that it knows will not gain approval, that problem may be properly addressed under Florida's Deceptive and Unfair Trade Practices Act, not under TILA. Mr. Bragg's state law claims survive the dismissal of his TILA claims.

Finally, the Eleventh Circuit in this case relied upon the Fourth Circuit's decision in *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), which is pending before this Court as Case No. 03-377. While the Question Presented in *Nigh* is not the same as is presented by this petition,[4] both cases involve the interpretation of TILA by the circuit courts. In *Nigh*, the Fourth Circuit stated:

> a number of courts have held that consummation, or extension of credit, can encompass unfunded financing agreements. We agree with this rule because the regulation expressly refers solely to the consumer's commitment and because TILA's express purpose of protecting consumers from receiving inadequate disclosures prior to their entering into credit transactions could not otherwise be effectuated.

319 F.3d at 124.

In reaching its conclusion in this case, the Eleventh Circuit relied upon *Nigh* for the proposition that TILA liability could "encompass unfunded financing agreements." Yet, the actual holding in *Nigh* demonstrates why the Eleventh Circuit erred in reinstating Mr. Bragg's claim.

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[4] The question presented by the certiorari petition in the *Nigh* case is: "Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap."

In *Nigh*, the dealership deemed Mr. Nigh contractually obligated to a credit transaction. The dealership did not want to let him out, and he was not able to get out. The following excerpt from the *Nigh* opinion makes that clear:

> This case arose from Koons Buick's sale of a truck to Bradley Nigh. The sale was not a simple cash-for-product exchange, but involved a somewhat tortured effort by Koons Buick to provide Nigh consumer financing.
>
> * * * *
>
> Nigh left the dealership in the Blazer, on the authority of a temporary certificate of ownership issued under Va. Code § 46.2-1542. Nigh left his trade-in vehicle behind, in anticipation that a lender would purchase assignment of the payments owed under RISC I and the transaction would close. Koons Buick, however, was unable to find a willing lender. Consequently, it restructured the deal to require an additional $2,000 down payment. The dealership represented this change to Nigh as a "better deal" at a lower rate, necessitating a new RISC (RISC II). Nigh returned to the dealership on February 25 based on this representation, but told Koons Buick he did not have an additional $2,000. *He asked to return the new truck, retrieve his trade-in vehicle, and walk away from the deal. Koons Buick, however, told him he could not withdraw because it had sold his trade-in.* Nigh, unaware of this statement's falsity, and at a loss, signed RISC II and a $2,000 Promissory Note to cover the added down payment.

319 F.3d at 122.

This case, in contrast, involves a consumer who was obviously not obligated to credit terms. As the district court held, under Florida law, the documents did not obligate Mr. Bragg to any particular credit terms. Indeed, he signed two Installment Sales Contracts on September 28, 2001, but there is no allegation that he intended to obligate himself to two credit

transactions for the purchase of one vehicle or that the dealership ever contended that he had.

In this connection, it is instructive to consider the allegations in the complaint concerning Robert Crabtree, a now-dismissed plaintiff. With respect to both Mr. Crabtree and Mr. Bragg, if Bill Heard Chevrolet could not obtain financing at the rates provided for in the conditional Installment Sales Contracts they signed, then each of them had the right to (i) agree to new financing terms, reflected in new transaction documents; or (ii) to get their down payment and trade-in value back and walk away. *Although Robert Crabtree has now been dropped as a plaintiff, the record shows that the latter is exactly what happened in his case.* (Pet. App. 26a; R-38 ¶ 40.

Thus, the Eleventh Circuit has inappropriately expanded the *Nigh* holding to encompass potentially all unfunded financing agreements rather than simply those where the consumer is actually obligated to the purchase of credit. By doing so, the Eleventh Circuit has nullified the Official Staff Commentary's deference to state law and has ignored the distinction between the pre-1982 Regulation Z and the current Regulation Z.

In particular, "[U]nder the previous definition, courts were to look at the point in time that the consumer first suffered economic coercion to obtain financing. Under the new, revised definition, this coercion element is omitted, and courts should only look at the point in time that the consumer becomes *contractually obligated* on the credit transaction." *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill. May 22, 1985).

By ignoring Florida contract law in favor of a federal common-law approach, the Eleventh Circuit has essentially returned to the previous definition of consummation, although the current definition constitutes a "significant departure"

from the outdated one. 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981). In the end, in misapplying language in the *Nigh* opinion to the facts of this case, the Eleventh Circuit reached a result that was not called for by the actual holding in *Nigh*—a result that is demonstrably in conflict with this Court's decision in *Milhollin*, the Federal Reserve Board's rules, and the Official Staff Commentary interpreting those rules.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[FILED June 25, 2004]

NO. 03-1 1384

D.C. Docket No. 02-00609-CV-8-6-30 EAJ

RANDAL S. BRAGG, ROBERT I. CRABTREE, *et al.*,
Plaintiffs-Appellants,

versus

BILL HEARD CHEVROLET, INC. - PLANT CITY,
WFS FINANCIAL, INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(June 25, 2004)

Before BLACK, BARKETT and STAHL*, *Circuit Judges*.

STAHL, *Circuit Judge*:

The issue before us is whether the district court correctly determined that plaintiff-appellant Randal Bragg failed to state a claim under the Truth in Lending Act, 15 U.S.C.

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

§ 1601, *et seq.* ("TILA") against defendant-appellee Bill Heard Chevrolet Inc.-Plant City ("Bill Heard"). We hold that Bragg's complaint does state a claim under TILA, and reverse the decision below.

I. BACKGROUND

We take the following recitation of facts from Bragg's amended complaint. *See La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004); *Omar v. Lindsey*, 334 F.3d 1246, 1247 (11th Cir. 2003). Bill Heard is licensed in Florida as a motor vehicle dealer and a motor vehicle retail installment seller. On September 28, 2001, Bragg visited Bill Heard and decided to purchase a new 2002 Chevrolet Silverado truck. As a down payment, Bragg paid six hundred dollars in cash and traded in his 1994 Ford Escort, which Bill Heard valued at five hundred dollars.

On that day, Bragg signed one Standard Purchase Contract ("Purchase Contract # 1") and two standard Florida Simple Interest Vehicle Retail Installment Contracts ("RISC #1" and "RISC #2"). Bill Heard did not sign these documents. Purchase Contract #1 listed the selling price of the truck as $19,253.34, plus a Silencer Alarm ("SAP") for $399.00 and Vehicle Theft Registration ("VTR") for $199.00.[1] RISC # 1 listed an annual percentage rate ("APR") of 14.65 percent, a finance charge of $10,947.33, and amount financed of $21,158.91. RISC #2 listed an APR of 14.50 percent, a finance charge of $10,642.05, and amount financed of $21,158.91. Both RISCs included insurance and debt cancellation coverage ("GAP Protection") for a charge of

[1] VTR is an anti-theft etching identification program that provides insurance benefits to customers in the event that their cars are stolen. SAP is an alarm installed on the vehicle that also provides insurance benefits.

$495.00.[2] Bill Heard is listed as the "Creditor-Seller" in the RISCs.

Bragg also signed a Bailment Agreement for Vehicle Spot Delivery ("Bailment Agreement"). This permitted Bragg to take possession of the new vehicle immediately. The Bailment Agreement explicitly incorporated the terms of the Purchase Contract.

On October 1, 2001, Bill Heard contacted Bragg and requested that he sign additional documents. This time Bragg signed two new Purchase Contracts ("Purchase Contract #2" and "Purchase Contract #3") and two new RISCs ("RISC #3" and "RISC #4"). Purchase Contract #2 listed a selling price of $18,993.00, plus an Extended Service Contract price of $990.00, while Purchase Contract #3 listed a selling price of $18,993.00. Neither of these two Purchase Contracts contained charges for VTR and SAP. RISC #3 listed an APR of 14.89 percent, a finance charge of $11,699.11, and an amount financed of $22,176.18, while RISC #4 listed an APR of 14.89 percent, a finance charge of $11,102.69, and an amount financed of $21,046.09. All four of these contracts were backdated by Bill Heard to the date of Bragg's first visit, September 28, 2001. None of the contracts were executed by Bill Heard.

On October 5, Bill Heard assigned RISC #4 to Triad Financial Corporation, and Triad issued payment to Bill Heard for $19,982.24. This RISC was the only one signed by Bill Heard.

Central to Bragg's claims is Bill Heard's "spot delivery" procedure. Here, we stress again that at this stage, we must accept as true the well-plead factual allegations in Bragg's

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[2] GAP protection is coverage offered to a customer in the event that the vehicle is determined by the relevant insurance company to be a total loss as a result of theft or physical damage. It covers the shortfall between the applicable insurance coverage and any amount still owed.

complaint, as well as all inferences from those allegations in the light most favorable to Bragg. *La Grasta*, 358 F.3d at 845; *Omar*, 334 F.3d at 1247. Under "spot delivery," the customer is presented with a Purchase Agreement, RISC, and Bailment Agreement. Bill Heard then delivers the car to the customer "on the spot" on the same date that the customer signs the documents, and allows him or her to take the car without the passage of title. The customer in return typically makes a cash deposit or trades in an existing vehicle as a down payment. Bragg contends that customers like him are "under the impression they have purchased a car under certain sales and finance terms." On occasion, Bill Heard will notify a customer that it was not able to secure the financing rates agreed to in the documents and ask them to sign new agreements with less favorable financing terms. If a new RISC is executed, the financing terms are calculated from the date of actual delivery of the vehicle to the customer. According to Bragg, Bill Heard never executes the original RISCs. Instead, it uses the initial lower financing rates to entice the customers under a "bait and switch" scheme. Bragg also asserts that Bill Heard requires forfeiture of the down payment or trade-in vehicle if the customer refuses to accept the new financing terms.[3]

On November 30, 2001, Bragg filed a class action suit against Bill Heard in state court on behalf of himself and several other similarly situated customers. The complaint set forth five counts: (1) violations of Florida's Deceptive and Unfair Trade Practices Act, Fl. Stat. §§ 501.201, *et seq.*; (2) unjust enrichment; (3) violations of TILA and Regula-

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[3] According to Bill Heard, if financing is not obtained, the consumer has no obligation to purchase the vehicle and instead must pay Bill Heard twenty cents for each mile driven during the bailment agreement. In that case, it contends, a deposit or trade-in car would be returned to the customer. If financing is obtained, the buyer receives title to the vehicle purchased and is not responsible for any rental fees.

tion Z; (4) violations of Florida's Motor Vehicle Retail Sales Finance Act, F1. Stat. §§ 520.01, *et seq.*; and (5) declaratory and injunctive relief. Bragg's TILA claim asserted that Bill Heard (1) failed to make required TILA disclosures prior to the buyer's consummation of credit terms; (2) failed to include in the finance charge the costs of credit insurance products sold in connection with the credit transaction, when it had failed to make the required disclosures as a pre-condition to excluding those charges from the finance charge; (3) failed to accurately disclose credit terms; (4) failed to state clearly that the APRs in the first two RISCs were "estimates"; and (5) failed to disclose any amounts it paid to third persons on Bragg's behalf.

Bill Heard removed the case to federal district court and on April 16, 2002, it moved to dismiss all of Bragg's claims pursuant to Fed. R. Civ. P. 12(b)(6). On September 1, 2002, the district court granted in part and denied in part Bill Heard's motion to dismiss and granted Bragg leave to file an amended complaint. We need not set forth each of the district court's dispositions in this first order.

On September 25, 2002, Bragg filed an amended complaint. In turn, Bill Heard moved to dismiss the TILA claim, arguing that Bragg never consummated a transaction with it in which a TILA violation occurred. On January 24, 2003, the district court dismissed the TILA claim with prejudice and declined to exercise supplemental jurisdiction over Bragg's remaining state law claims. It concluded that Bragg never consummated either of the first two RISCs because the relevant agreements contained an unsatisfied condition precedent: specifically, neither party was "bound" until Bill Heard sold either of the RISCs to another lender.

On January 29, 2003, Bragg filed a motion for rehearing. On February 14, in a published opinion, the district court again held that the first two RISCs were never consummated and hence no TILA violated occurred. *Bragg v. Bill Heard*

Chevrolet, Inc., 245 F.Supp.2d 1235 (M.D. Fla. 2003). The court also rejected Bragg's renewed argument that Bill Heard failed to clearly state that the APRs in the first two RISCs were "estimates" and thus in violation of TILA. *Id.* at 1238-39.

This appeal followed.[4]

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[4] On February 7, Bragg filed a motion seeking approval to exceed the twenty-page limit for a motion for rehearing of the January 24 order dismissing Bragg's claims (which was docketed on January 27) and a February 3, 2003 order striking another class member's (John Cone) motion to intervene in the lawsuit (which was docketed on February 5). Attached to the motion was his proposed twenty-five page Fed. R. Civ. P. 59(e) motion for rehearing of the two orders, which the district court did not separately docket on that date but instead forwarded to chambers. On February 11, the court granted the motion for extension of the page limit and the clerk docketed the Rule 59(e) motion on the same day. On February 18, the district court denied Bragg's 59(e) motion. Bragg then moved for clarification as to whether the court, in its January 27 and February 18 orders, intended to remand his state law claims back to state court. On February 27, the court granted the motion for clarification and directed the clerk to remand the case to state court. On March 13, Bragg filed a notice of appeal to challenge the January 27 dismissal and the February 5 denial of Cone's motion to intervene.

To be timely, a notice of appeal in a civil case must be filed no later than thirty days after entry of the challenged order or judgment. Fed. R. App. P. 4(a)(l)(A). A motion to alter or amend a judgment, pursuant to Fed. R. Civ. P. 59(e), filed within ten business days of the entry of the challenged decision tolls the appeal period until the entry of the order resolving the last such motion.

Fed. R. App. P. 4(a)(4). The order resolving Bragg's Rule 59(e) motion was entered on February 18; hence, if the motion tolled the appeal period, the notice of appeal challenging the January 27 dismissal order was due on March 20.

We hold that Bragg's notice of appeal was timely. The Rule 59(e) motion, filed on February 7, was timely under Fed. R. App. P. 4(a)(4) to toll the appeal period prescribed by Fed. R. App. 4(a)(l)(A). Though the clerk did not docket the Rule 59(e) motion until February 11, Bragg physically filed the motion on February 7, the ninth business day

II. DISCUSSION

A. *Applicable law*

We review a district court's dismissal for failure to state a claim de novo. *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1090 (11th Cir. 2002). In dismissing a complaint, the facts alleged therein must be taken as true and the district court must determine "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). Contract interpretation is a question of law that we review *de novo*. *Southland Distrib. Mktg. Co., Inc. v. S & P Co.*, 296 F.3d 1050, 1053 (11th Cir. 2002) (citing *Gymco Constr. Co., Inc. v. Architectural Glass and Windows, Inc.*, 884 F.2d 1362, 1364 (11th Cir. 1989)).

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following the entry of the January 27 dismissal order. Several circuits have determined that pleadings should be deemed filed on the date submitted to the clerk. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 83 (2d Cir. 2000); *Werth v. Makita Electric Works. Ltd.*, 950 F.2d 643, 646-47 (10th Cir. 1991); *Sierra On-Line, Inc. v. Phoenix Software. Inc.*, 739 F.2d 1415, 1419-20 (9th Cir. 1984). Fed. R. Civ. P. 5(e) provides that "filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court . . . . The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules of practices." The clerk did not technically refuse Bragg's noncompliant 59(e) motion for filing. In fact, the motion bears the clerk's stamp that it was filed on February 7. In any event, it is apparent that here the district court excused any noncompliance with its local page limit rule and deemed the motion timely filed. Moreover, there is no evidence that Bragg exhibited a lack of diligence in filing his motion. In previous cases, we have been concerned that a motion to extend the appeal period may not be construed as a notice of appeal when it evinces uncertainty as to whether the party will in fact appeal. *See e.g., Harris v. Ballard*, 158 F.3d 1164, 1166 (11th Cir. 1998). That concern is absent here.

TILA's declaration of purpose states, in relevant part:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms . . . would be strengthened by the informed use of consumer credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601 (a). As a remedial statute, TILA must be construed liberally in favor of the consumer. *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998); *Cody v. Cmty. Loan Corp. of Richmond County*, 606 F.2d 499, 505 (5th Cir. 1979).[5]

When a creditor sells credit property insurance in connection with a credit transaction, TILA requires the creditor to make certain disclosures to buyers before they become obligated on a RISC in which the creditor has excluded the charge for such insurance from the finance charge and included it in the amount financed. 15 U.S.C. § 1605(c). In this case, Bragg alleged that VTR, SAP and GAP constituted credit property insurance that was included in the amount financed and hence triggered the TILA requirements.

The specific content and timing of the disclosures are set forth in Regulation Z, which was adopted by the Federal

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 12, 1981.

Reserve Board in support of TILA. 15 U.S.C. § 1638(a); 12 C.F.R. §§ 226.2(a)(13) and 226.18; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980) (courts must defer to the regulations of the Federal Reserve Board when interpreting TILA). Regulation Z requires that the creditor disclose the identity of the creditor, the amount being financed, the annual percentage rate, the total sale price, and the total amount of payment. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18. These disclosures must be made "before credit is extended," a point known as "consummation." "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). We evaluate TILA transactions from the consumer's viewpoint. *Cody*, 606 F.2d at 505.

Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes"; that question is governed by federal law. *Cody*, 606 F.2d at 505. Under Florida law, the interpretation of contracts is a question of law if the contractual language is clear and unambiguous. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. App. 3 Dist. 1996).

B. *Consummation theory of TILA liability*

Bragg contends that the district court erred in holding that no pertinent credit agreement was consummated. He maintains that in this case, consummation occurred not when title to the automobile passed or when a bilateral contract was formed, but rather when he signed the RISCs, thereby becoming obligated on the credit agreement.

We agree that well-reasoned case law supports this interpretation. Recently, the Fourth Circuit held that TILA can encompass unfunded financing agreements. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 123 (4th Cir. 2003), cert. granted, *Koons Buick Pontiac GMC. Inc. v. Nigh*, 124 S.Ct. 1144 (2004).[6]

Seeking to buy a car and trade in his existing vehicle, Nigh signed a Buyer's Order reflecting the proposed purchase and a RISC setting forth the proposed financing. *Id.* at 122. As in Bragg's case, the dealer did not countersign either document; rather, it intended to sign only ~~when a~~ lender agreed to buy an assignment of the installment payments owed under the RISC. *Id.* "The transaction's closing and the completion of Nigh's purchase were thus left within the dealership's unilateral control."*Id.*

Applying Regulation Z, the *Nigh* court joined others holding that consummation can encompass unfunded financing agreements. *See, e.g., Cannon v. Metro Ford, Inc.*, 242 F.Supp.2d 1322, 1330 (S.D.Fla. 2002); *Johnson v. Steven Sims Subaru. Inc.*, 1993 WL 76231 (N.D.Ill. 1993); *Bryson v. Bank of New York*, 584 F.Supp. 1306 (S.D.N.Y. 1984); *Madewell v. Marietta Dodge, Inc.*, 506 F.Supp. 286 (N.D.Ga. 1980); *Copley v. Rona Enterprises, Inc.*, 423 F.Supp. 979 (S.D.Ohio 1976); *see also Clark v. Troy and Nichols. Inc.*, 864 F.2d 1261, 1265 (5th Cir. 1989) (Thornberry, J., dissenting). We agree that this holding is consistent with Regulation Z's exclusive reference to the consumer's commitment. *See Nigh*, 319 F.3d at 124. It is also in keeping with TILA's overarching purpose of consumer protection. *See id.*

> [T]he point at which the consumer . . . commits himself or herself to the purchase of credit, without regard for the degree of commitment of the lender . . . [is the point at which] the consumer becomes vulnerable to actual

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[6] The certiorari petition does not concern the consummation issue.

> damage from the lender's inadequate or deceptive disclosures, for at this time he or she can be contractually bound to the terms of the lending contract at the option of the lender.

Bryson, 584 F.Supp. at 1317.

The district court held, however, that Bragg's obligations under the first and second RISCs never arose because they were contingent on Bill Heard's obtaining financing. It pointed out that the Purchase Contracts signed by Bragg set forth a condition precedent of financing approval. *Bragg*, 245 F.Supp.2d at 1238 n.4. The Purchase Contracts provided that the Seller agrees to sell the designated vehicle "provided however, the designated financial institution approves Purchaser's request for a loan . . ." The Purchase Contracts additionally stated, "Neither party hereto shall be bound to the other until terms of credit have been approved by both parties . . ." Moreover, the Bailment Agreement incorporated the terms of the Purchase Contracts and stated that it was "pending credit approval of buyer(s) by lending institution and completion of sales transaction."

Under Florida law, parties can condition formation of a contract on the occurrence of an event. *See, e.g., Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla.App. 3 Dist. 1958); 777 *Flagler Co. v. Amerifirst Bank*, 559 So. 2d 1210, 1211 (Fla. App. 4 Dist. 1990). There was no condition precedent set forth in the RISCs themselves. The district court held that under Florida contract law, however, the condition of financing approval contained in the Purchase Contracts and Bailment Agreement nonetheless was applicable. "Under Florida law, where two or more documents are executed by the same parties, at or near the same time and concerning the same transaction or subject matter, the documents are generally construed together as a single contract." *Clayton v. Howard Johnson Franchise Systems. Inc.*, 954 F.2d 645, 648

(11th Cir. 1992); *Quix Snaxx, Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998).

Bragg contends that the relevant Purchase Contracts and Bailment Agreement should not be considered along with the RISCs because they were not "executed" within the meaning of the applicable Florida case law, as they were never signed by Bill Heard. He also maintains that those agreements were ambiguous, requiring construction against the drafter, Bill Heard, and precluding its modification of the RISCs. Moreover, Bragg contends that the Bailment Agreement is void and unenforceable under Florida law because it was not first signed by Bill Heard, and because it contravenes public policy. *See* Fla. Stat. §§ 520.07(1)(a) and 520.07(7).

As an initial matter, it is far from clear whether the rule of contract law articulated in *Quix Snaxx* would apply to these documents. The RISCs provided simply, "[b]y signing this contract, you choose to buy the vehicle under the agreements on the front and back of this contract"; they did not refer explicitly to the Purchase Contract or any other document containing a condition precedent.

See Quix Snaxx, 710 So. 2d 153 ("Where a writing expressly refers to and sufficiently describes another document, the other document . . . is to be interpreted as part of the writing."). Nor did the Purchase Contracts or Bailment Agreements reference the RISCs. *See id.* Moreover, the RISCs contained a modification clause: "This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it." Furthermore, as noted *supra*, Bill Heard did not sign the Purchase Contracts or Bailment Agreement, leaving them technically unexecuted. We could find no cases extending the *Quix Snaxx* rule to the circumstances alleged here.

We need not resolve this legal question, however. In any event, even assuming the RISCs contained a condition precedent, the district court was incorrect in finding that consummation occurred only upon assignment of the loan. Under the district court's interpretation of Florida law and Regulation Z, a creditor could provide necessary TILA disclosures after the consumer signed a conditional financing agreement as long as the disclosures were made sometime before the loan was assigned. Disclosures that come after the consumer executes a RISC, however, are likely to be of little or no value to that consumer.

Therefore, we reject the district court's reading of Regulation Z as contrary to the central goal of TILA, which is to provide "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. § 1601 (a). As this court has explained, "[w]hile it is true that the language of a statute should be interpreted according to its ordinary, contemporary and common meaning, this plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute." *Bailey v. USC Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (emphasis added) (internal citation omitted). Given the strong remedial purpose of TILA and continual admonitions that we construe TILA and Regulation Z liberally in the consumer's favor, *see. e.g. Cody*, 606 F.2d at 505, we cannot accept the district court's interpretation of Regulation Z, as it would undermine the ability of prospective consumers of credit to weigh competing offers.

Regardless of "the degree of commitment of the lender" contained in the agreements' condition precedent, *Bryson*, 584 F. Supp. at 1317, Bragg's signature on these documents rendered him contractually obligated to the purchase of credit and thus constituted consummation for purposes of TILA disclosures. To give full effect to TILA's goal of providing

meaningful and timely disclosure of important credit terms, we hold that in a financing agreement containing a condition precedent where the condition of obtaining financing is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract.

C. *"Estimates theory" of TILA liability*

Bragg offers another theory of Bill Heard's liability under TILA: that it violated the statute by failing to label its credit terms in the first two RISCs as estimates and to compute the APR accordingly. In addition, he contends that Bill Heard violated TILA by disclosing an inaccurate APR in RISC #4, specifically by backdating the RISC #4 to September 28, 2001, and by computing the APR and charging interest from that date. In his reply brief, Bragg makes clear that these arguments are intended to be alternative positions to be pursued only if this court affirms the dismissal below. As we reverse, we need not address this theory.

III. CONCLUSION

For the reasons set forth *supra*, we REVERSE the district court's dismissal of Bragg's TILA claim and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:02-cv-609-T-30EAJ

RANDALL S. BRAGG, *et al.*,
Plaintiffs,

v.

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Defendant.

ORDER

THIS CAUSE comes before the Court upon Plaintiffs' Motion for Rehearing on January 24th Order and February 3rd Order and Memorandum of Law in Support (Dkt. #83). After close consideration this Court denies Plaintiffs' motion.

BACKGROUND

Plaintiffs brought this putative class action seeking statutory penalties, damages and restitution for alleged violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. ("TILA") against Bill Heard, Florida Motor Vehicle Retail Sales Finance Act claims, Fla. Stat. § 520.01, *et seq*. ("Section 520") against Bill Heard, Florida Deceptive and Unfair Trade Practices claims, Fla. Stat. § 501.211 ("FDUTPA") against Bill Heard, and for restitution against all Defendants.

On September 25, 2002, Plaintiffs filed their Third Amended and Supplemental Class Action Complaint and Demand for Jury Trial (the "Complaint") (Dkt. #38). Plaintiffs' claims centered on disputes arising out of their

purchases or attempted purchases of motor vehicles from Bill Heard. The Plaintiffs' federal claim alleged that Bill Heard failed to comply with the mandatory disclosure requirements of TILA with respect to two of the Plaintiffs, Bragg and Crabtree.

Bill Heard moved to dismiss Bragg and Crabtree's TILA claim, arguing that Bragg and Crabtree never consummated a transaction with Bill Heard in which a TILA violation occurred. Plaintiff Crabtree conceded in the Complaint that he returned the motor vehicle he attempted to purchase and received his trade-in and down payment back from Bill Heard. Plaintiff Bragg conceded in his response to Bill Heard's motion to dismiss that there were no TILA violations in the final Retail Installment Sales Contract ("RISC").[1] Instead, Plaintiffs argued that because there were uncorrected TILA violations in unfunded RISCs, Bill Heard was still liable under TILA.

On January 34,2002, this Court entered its order granting in part Bill Heard's motion This Court dismissed with prejudice Bragg and Crabtree's TILA claims, to dismiss. concluding as a matter of Florida law that no transaction ever Consummated in which a TILA violation occurred.[2] With no remaining federa1 claims before it, this Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims and dismissed this action without prejudice.[3]

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[1] Plaintiffs attached all the EUSCs and purchase aseements for Bragg.

[2] This Court's ruling was based on the allegations concerning Bragg and Crabtree and not on the class allegations contained in the Complaint. No notice or opportunity to be heard was afforded to members of the class other than the named plaintiffs. This Court's order should have no effect on any claim other than the TILA claims of Bragg and Crabtree (the two named plaintiffs with TILA claims). *See, e.g.. Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998).

[3] When asked at oral argument on January 14, 3002, Plaintiffs' counsel responded that if there was no TILA violation, then there was no reason

On January 29, 2003, Plaintiffs belatedly filed a motion to have a new plaintiff intervene. On February 3, 2003, this Court concluded that a motion to intervene was untimely and struck the motion to intervene.

LEGAL ANALYSIS

A motion to alter or amend a judgment under Federal Rules of Civil Procedure Rule 59(e) lies within the sound discretion of the district court. *See American Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1238, 1239 (11th Cir. 1985). The underlying motion that this Court is being asked to reconsider is a motion to dismiss. Plaintiffs are correct that the appropriate standard for deciding to dismiss a complaint is whether it appears beyond a reasonable doubt that the Plaintiffs can prove no set of facts to support their claims. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). This court, however, may dismiss a complaint on a dispositive issue of law. *See Marshall County*, 992 F2d at 1174; *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1013 (11th Cir. 1986). This Court's January 24, 2003, order dismissed the Complaint based on a dispositive issue of law: when consummation occurred.

A. Consummation

Bill Heard had no obligation to provide TILA disclosures prior to obtaining financing approval. TILA requires disclosure of certain information "before credit is extended." 15 U.S.C. § 1638(b)(1). Section 226.17(b) of Regulation Z interprets "before credit is extended" to require disclosure prior to the consummation of the transaction. 12 C.F.R.

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for this Court to exercise supplemental jurisdiction. *See* Hrg. Tr. 1/14/03 at 47.

§ 226.17(b). Consummation is further defined as "the time that a consumer becomes contractually obligated on a credit transaction." *See* 12 C.F.R. § 226.2(a)(13).

The Supreme Court has held that courts, like this Court, must grant great deference to the official staff commentary of Regulation Z. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). The official commentary on the definition of consummation indicates that state law, not Regulation Z, determines when a consumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13). Florida contract law construes contract clauses like those in this case to create a condition precedent to contract formation. *See Huskamp Motor Co. v. Hebden*, 104 So.2d 96, 98 (Fla. 3d DCA 1958).[4]

This Court is not "eviscerating" TILA with its decision. It is, instead, heeding the Supreme Court's admonition and following the Federal Reserve Board's Official Staff Interpretation, which in turn requires this Court to follow Florida contract law.[5]

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[4] This Court has twice held that title to the motor vehicles did not pass when the original RISCs and purchase agreements were signed. While Plaintiffs may disagree, the documents attached to the Complaint are unambiguous that title passed only on (among other things) financing approval.

[5] This Court's decision on January 24, 2003, was in no way based on the fact that Bill Heard was not a creditor for TILA purposes. This Court declines to reach the "deception" issue raised for the first time in this motion by Plaintiffs. If this Court took Plaintiffs' invitation, it would first have to disregard an unambiguous contract and decide Plaintiffs novel state law claims. If those claims by chance are successful, it could then make a determination on Plaintiffs' TILA claims. Such a process is inefficient. Additionally, this Court has serious concerns about whether many of Plaintiffs' Section 520 and FDUTPA theories are supported under existing law (or nonfrivolous extensions/modifications thereto).

Plaintiffs rely on the recent decision of the Fourth Circuit in support of their expansion of liability under TILA. *See Nigh v. Koons Buick Pontiac GMC. Inc.*, case no. 01-2201, 2003 WL 231322 (4th Cir. February 4, 2003). Plaintiffs are correct that in *Nigh* the Fourth Circuit held that TILA can encompass unfunded financing agreements. *See* 2003 WL 231322, at *3. In the *Nigh* opinion, the Fourth Circuit, however, neither discusses the official interpretation of "consummation" under Regulation Z nor Virginia contract law. Instead, the Fourth Circuit concluded that the general consumer protection policy contained in TILA would be better served by extending coverage to unfunded financing agreements. *See id.* at *3-4.

This Court is not free to ignore the official staff interpretation (or Florida law) to reach what may or may not be a better policy result. This Court will defer to the Federal Reserve Board and its interpretation of consummation. In this case, this deference leads to the inescapable conclusion that Plaintiffs Bragg and Crabtree cannot state a claim for relief because an unsatisfied condition precedent existed in the transactions that contained alleged TILA violations.

B. Estimates

Bragg renews his argument that this Court's ruling makes the TTLA disclosures provided by Bill Heard estimates. Bragg does not argue that any disclosures made by Bill Heard were inaccurate based on the parties written agreement or the date that the parties agreed to use in the transaction documents. Instead, Bragg argues that the disclosures made were estimates because he did not have title to the motor vehicle and the contract was not actually consummated on the date contained in the contract. This Court in its prior orders (Dkts. #35, 58) did not make a distinction between conditions precedent or subsequent. The cases cited by this Court may have involved conditions subsequent, but this does not change this Court's analysis. Buyers and car dealers are not

prohibited under TILA from backdating a contract. Such arrangements provide benefits and value to consumers. In this case, Bragg got use of a motor vehicle without paying the rental fee due under the bailment agreement in exchange for backdating the contract. TILA is a statute that makes sure that the disclosures given to a consumer are accurate based on their agreement with the creditor. TILA does not prohibit, restrict, or otherwise control the parties' right to freedom of contract.

C. Motion to Intervene

Finally, Plaintiffs argue that this Court should have not stricken their motion to intervene because at 4:48 PM on January 23, 2003 (the night before the January 24, 2003 order was entered) they filed a notice with this Court telling this Court of their intent to have Cone intervene. A motion to intervene must be timely filed. *See United States v. U.S. Steel Corp*, 548 F.2d 1232, 1235 (5th Cir. 1977); *Haymond v. Lundy*, 205 F. Supp. 2d 390, 409 (E.D. Pa. 2002). Filing a notice at the eleventh hour and a motion four days later in these circumstances was not timely. Cone has offered no excuse for his delay in intervening in this suit. This action has been pending for over a year. The motion to dismiss that this Court granted was pending for over three months, and oral argument on the pending claims had been heard nine days before the filing of the notice. At that oral argument, Plaintiffs did not raise the possibility of intervention. Instead, Plaintiffs stated that there was no reason for this Court to retain jurisdiction if it dismissed Bragg and Crabtree's TILA claims. If Cone wishes to pursue his TILA claim, he may do so in a new suit. Without any reason for such a delay and with no prejudice to Cone, there is no reason for this Court to reconsider its February 3, 2003, order striking his motion to intervene.

It is therefore ORDERED AND ADJUDGED that:

(1) Plaintiffs' Motion for Rehearing on January 24th Order and February 3rd Order and Memorandum of Law in Support (Dkt. #83) is DENIED.

(2) The clerk is directed to terminate all pending motions and close this file.

DONE and ORDERED in Tampa, Florida on this 14th day of February, 2003.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

APPENDIX C

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

[FILED JAN. 24, 2003]

CASE NO: 8:02-cv-609-T-30-EAJ

RANDALL S. BRAGG, *et al.*,
Plaintiffs,

v.

BILL HEARD CHEVROLET, LNC.-PLANT CITY, *et al.*,
Defendants.

ORDER

This cause came on to be considered on:

(1) Defendant Bill Heard Chevrolet, Inc.-Plant City's ("Bill Heard") Motion for a More Definite Statement and to Dismiss "Third Amended" Complaint (Dkt. #44), memorandum of law (Dkt. #45), and notice of filing supplemental authority (Dkt. #71);

(2) Defendant Affiliated Financial Corporation's ("AFC") Motion to Dismiss, and or Motion for More Definite Statement and Memorandum of Law (Dkt. #46);

(3) Defendant Triad Financial Corporation's ("Triad") Motion to Dismiss or for More Definite Statement (Dkt. #47) and memorandum of law (Dkt. #48);

(4) Defendant WFS Financial, Inc.'s ("WFS") Motion to Dismiss, and/or, in the Alternative Motion for More Definite Statement and Memorandum of Law (Dkt. # 49);[1]

(5) Plaintiffs' memorandum in opposition (Dkt. # 56), responses thereto (Dkts. #59, 60, 6l), and notice of filing supplemental authority (Dkts. #70, 75).

After close consideration of the motions, memoranda of law, responses, and supplemental authority submitted by the parties, hearing oral argument on January 13, 2003, and being otherwise fully advised, the Court concludes as follows:

This Lawsuit

Plaintiffs bring this putative class action seeking statutory penalties, damages and restitution for alleged violations of the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA") against Bill Heard, Florida Motor Vehicle Retail Sales Finance Act claims, Fla. Stat. § 520.01, *et seq.* ("Section 520") against Bill Heard, Florida Deceptive and Unfair Trade Practices claims, Fla. Stat. § 501.211 ("FDUTPA") against Bill Heard, and for restitution against all Defendants. alternatively for a more definite statement. Defendant Bill Heard moves to dismiss all four counts or Defendants Triad, AFC, and WFS move separately to dismiss count four or alternatively for a more definite statement.

Plaintiffs' claims center on disputes arising out of their purchases or attempted purchases of motor vehicles from Bill Heard. The Plaintiffs' federal claim alleges that Bill Heard failed to comply with the mandatory disclosure requirements of TILA with respect to two of the Plaintiffs, Bragg and Crabtree. Bragg and Crabtree claim that Bill Heard improperly included costs for vehicle theft registration

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[1] Collectively Bill Heard, AFC, Triad, and VTS are referred to as "Defendants."

('VTR"),[2] Silencer alarm protection ("SAP"),[3] and GAP protection[4] in the amount financed section of their agreements instead of in the finance charge section without providing the necessary disclosures under TILA. This inclusion without disclosure allegedly caused two violations of TILA: (1) a disclosure violation; and (2) an inaccurate annual percentage rate ("APR").

The remaining parties with a federal claim[5]

Bragg

On September 28, 2001, Plaintiff Bragg signed two Florida Simple Interest Vehicle Retail Installment Sale Contracts ("RISCs"), a standard purchase agreement,[6] and a bailment

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[2] VTR is an anti-theft etching program that provides certain undisclosed property insurance benefits to customers if their motor vehicle is stolen. *See* Third Amended Complaint [hereinafter "Complaint" or abbreviated "Compl."] ¶ 92.

[3] SAP is a silencer alarm installed on at least some motor vehicles sold by Bill Heard that, like VTR, provide certain undisclosed property insurance benefits if their motor vehicle is stolen. *See id.* ¶ 99.

[4] GAP protection is coverage offered to a customer in the event the motor vehicle is determined by the applicable insurance company to be a total loss as a result of theft or physical damage, and covers the shortfall between the applicable insurance coverage and the amount still owed. *See id.* ¶¶ 105-106.

[5] The Complaint makes sufficiently clear that only Plaintiffs Crabtree and Bragg are making TILA claims. *See* Compl. ¶¶ 136, 137, 140. Moreover, Plaintiffs have also made clear that the only plaintiff making a GAP claim is Bragg. *See* Memo. in Opp'n at 5

[6] The purchase agreements provided that Bill Heard retained title pending credit approval. *See* Compl. Exs. A-1, A-5, A-6, B-1. Moreover, the purchase agreements also stated that ". . . Seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser, provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." *See id.* (emphasis added). The purchase agreements further provided that in a credit transaction "neither

agreement, relating to a 2002 Silverado truck. *See* Compl. ¶¶ 14, 17, 18; Exs. A-1, A-2, A-3, A-4. The RTSCs differ principally on the APR (14.65% versus 14.5%). Compare Compl. Ex. A-3 with Ex. A-3. The purchase agreement included charges for VTR and SAP. *See id.* Ex. A-1. The two RISCs contained a charge for GAP protection. *See id.* Exs. A-2, Ex. A-3.

The bailment agreement provided that the transaction is not complete[7] and that "if Dealer is able to provide Buyer(s) with financing according to the terms of the Sales Agreement, said agreement [the purchase agreement] shall be binding upon Buyer(s) and enforceable by Dealer." *Id.* Ex. A-4. Title to the truck did not pass to Bragg, but because of the bailment agreement, Bragg was allowed to drive home in his truck. *See id.*

On October 1,2001, Bill Heard contacted Bragg, and requested that he sign additional contracts. *See id.* ¶ 20. Bragg signed two "new" purchase agreements and FUSCs, dating all the documents back to September 28, 2001. *See id.*; *id.* Exs. A-5, A-6. Bragg neither purchased VTR, SAP, nor GAP protection in the new purchase agreements or RISCs. *See id.*

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party hereto shall be bound to the other until terms of credit have been approved by both parties . . . ." *See id.* (emphasis added).

[7] The bailment agreements list more than credit approval as being necessary to complete the transaction. *See* Compl. Exs. A-4, B-3. Additionally, the buyer may still have to make a down payment or the parties may have to adjust the trade in value because the payoff on the trade-in was different than that which was contemplated on the purchase agreement. *See id.*

Further, the bailment agreements incorporate the terms of the purchase agreements, stating that "[d]elivery of said vehicle is subject to all terms and conditions in said sales agreement and in the promissory note and sales agreement, if any, executed concurrently or in accordance therewith. Said vehicle shall remain the property of dealer." *See id.*

Exs. A-5, A-6, A-7, A-8, A-9. The RISCs differed solely on the amount financed.[8] *See id.* Exs. A-7, A-8, A-9.

On October 5, 2002, a purchase agreement and RISC that neither included the purchase of VTR, SAP, nor GAP was completed and assigned to Defendant Triad. *See* Memo. in Opp'n at 10; Compl. Exs. A-6, A-9. It is this purchase agreement (the third) and RISC (the fifth) that Bragg is obligated under currently. *See* Memo. in Opp'n at 10 n.17.

Crabtree

On January 12, 2002, Plaintiff Crabtree signed a RISC, standard purchase agreement, and a bailment agreement, relating to a 1999 Dodge Durango.[9] *See* Compl. ¶¶ 32, 35, 36; Exs. B-1, B-2, B-3. The purchase agreement included VTR and an extended service plan in the amount financed section. *See id.* ¶¶ 24, 26, 28, Ex. A-1. Crabtree later returned the Dodge Durango to Bill Heard and received his cash deposit and trade-in back from Bill Heard. *See id.* ¶ 40.

Procedural Posture

On September 11, 2002, this Court entered its Order (Dkt. #35) granting in part and denying in part Bill Heard's prior Motion to Dismiss (Dkt. #6). The Court dismissed:

> (1) Plaintiffs Reichert, Stebbins, and former Plaintiff Weidman's TILA claims; (2) Plaintiffs' estimates claim under TILA; and (3) Plaintiffs Crabtree and Nichols GAP disclosure claim under TILA. The Court denied Bill Heard's motion as to: (1) Plaintiffs' claim that Bill Heard's VTR disclosure violated TILA; and (2) Plaintiff

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[8] The difference in the purchase agreements is attributable to Bragg purchasing an extended service contract in one of the purchase agreements and that increased the amount financed. Bragg has made no allegation that Bill Heard failed to properly disclose the extended service plan correctly.

[9] The language of Crabtree's agreements is identical to that of Braggs' agreements.

Bragg and former Plaintiff McGehee's GAP TILA disclosure claim.

On September 25, 2002, Plaintiffs filed their Third Amended and Supplemental Class Action Complaint and Demand for Jury Trial (DAL #38). Plaintiffs added Triad, AFC, and WFS as Defendants. Plaintiffs also added a count for restitution against all four Defendants. Moreover, this Complaint contains additional attachments and allegations, concerning principally Plaintiffs Bragg and Crabtree. These additional attachments and allegations have led to arguments that Bragg and Crabtree's claims should be dismissed for reasons not considered previously by this Court.

Standard of Review

The appropriate standard for deciding to dismiss a complaint is whether it appears beyond a reasonable doubt that the Plaintiffs can prove no set of facts to support their claims. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996); *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993). The Court must view the Plaintiffs' Complaint in the light most favorable to the Plaintiffs and construe the allegations in the complaint as true. *See Hishon v. King & Spalding*, 367 U.S. 69, 73 (1984); *Scheauer v. Rhodes*, 416 U.S. 232 (1974); *Quality Foods de Centro Am. S.A. v. Latin Am. Agribusiness Devel. Corp.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. *See Marshall County*, 992 F.2d at 1174 (11th Cir. 1993); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1013 (11th Cir. 1986).

Legal Analysis

A. *TILA claim*

Defendant Bill Heard argues in its Motion to Dismiss that no TILA cause of action exists because Bragg and Crabtree never consummated a transaction with Bill Heard in which an alleged TILA violation occurred. In response, Bragg and Crabtree argue that a transaction was consummated for TILA purposes every time Bragg or Crabtree signed a purchase agreement or RISC regardless whether the purchase became completed. After careful consideration, this Court concludes that neither Bragg nor Crabtree consummated a transaction that contained an alleged TILA violation, and Bill Heard's Motion to Dismiss Plaintiffs' TILA claims should be granted.

TILA is a consumer protection statute designed to protect consumers from entering into contracts for financing without proper disclosure of fees, rates, and other information. *See* 15 U.S.C. § 1601, *et seq*. The Federal Reserve Board promulgated a set of technically intricate regulations that support TILA known as Regulation 2, 12 C.F.R. § 226.1, *et seq*. Strict compliance with TILA and Regulation Z is required. *See Shroder v. Suburban Coastal Corp*., 729 F.2d 1371, 1380 (11th Cir. 1984).

TILA requires disclosure of certain information "before credit is extended." 15 U.S.C. § 1638(b)(l). Section 226.17(b) of Regulation Z interprets "before credit is extended" to require disclosure prior to the consummation of the transaction. 12 C.F.R. § 226.17(b). Consummation is further defined as "the time that a consumer becomes contractually obligated on a credit transaction." *See* 12 C.F.R. § 2262 (a)(13).

The official commentary to this definition in turn indicates that state law, not Regulation Z, determines when a con sumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary

2(a)(13).[10] The official interpretation additionally indicates that in determining when a transaction "consummated," facts such as whether the consumer pays some nonrefundable fee or suffers an economic penalty for failing to go forward are irrelevant. *See* 12 C.F.R. Chapter 2, art. 226.2 Supp. 1, at 676. Neither party has cited to a decision by the Eleventh Circuit or a district court, interpreting when consummation for TILA purposes occurs under Florida law.[11]

This Court agrees with Plaintiffs that an automobile is a "good"[12] and that Florida's version of Article 2 of the Uniform Commercial Code ("UCC") applies to both Bragg and Crabtree's dealings with Bill Heard.[13] Moreover, this Court agrees that formation of a sales contract under Florida law is generally governed by Section 672.204. Fla. Stat. § 672.203. Under Section 672.204, formation occurs "in any manner sufficient to show agreement." Fla. Stat. § 672. 204(1). Further, Section 672.204(3) provides that a contract can be made "[e]ven though one or more terms are left

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[10] In *Ford Motor Credit Co. v. Milhollin*, the Supreme Court held that courts must grant great deference to the official staff commentary to Regulation Z. 444 U.S. 555 (1980).

[11] Bragg and Crabtree do cite to the former Fifth Circuit case *Cody v. Community Loan Corn. of Richmond County*, 606 F.2d 499 (5th Cir. 1979). In *Cody*, the Fifth Circuit stated in the context of when a "sale" occurred that courts should examine the transaction "through the eyes of the consumer." *Id.* at 505. While this statement is helpful, it does not determine when contracts were formed under Florida law.

[12] The applicable test is whether the item is moveable at the time of identification to the contract for sale. *See* Fla. Stat. § 672.105(1). A motor vehicle clearly meets this definition.

[13] Under Florida law, contract interpretation is a question of law if the language of the contract is clear and unambiguous. *See Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996); *Viennau v. Metropolitan Life Ins. Co.*, 548 So. 2d 856, 859 (Fla. 4th DCA 1989); *Zepfer v. Neandross*, 497 So. 2d 901, 903 (Fla. 4th DCA 1986). The language of the agreements in this case is clear and unambiguous.

open . . . if the parties have intended to make a contract . . ." Fla. Stat. § 672.204(3).

Where this Court disagrees with the Plaintiffs is that Article 2 of the UCC ends the analysis of whether and when a contract was formed in this situation. The UCC provides that in the absence of a particular provision governing a subject, Florida contract law supplements the UCC. Fla. Stat. § 671.103. In this case, the purchase agreements all contain a condition precedent to contract formation.[14] The purchase agreements specifically state that "neither party hereto shall be bound to the other until *terms of credit* have been approved by both parties . . . ." *See* Compl. Ex. A-1, A-5, A-6, B-1 (emphasis added).[15]

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[14] At oral argument Plaintiffs Bragg and Crabtree contended that the RISCs, purchase agreements, and bailment agreements that they executed contemporaneously should not be construed together. Alternatively, Plaintiffs contended that the merger clause in the RISCs eliminated the bailment agreements (and the purchase agreements presumably too). Plaintiffs contention is contrary to Florida contract law. Florida contract law holds that "[d]ocuments executed by the same parties, on or near the same time, and concerning the same transaction or subject matter are generally construed together as a single contract." *Quix Snaxx. Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998) (emphasis added); *also Mnemonics. Inc. v. Max Davis Assocs., Inc.*, 808 So. 2d 1278, 1280 (Fla. 5th DCA 2002) (stating same). This Court concludes that the RICSs, purchase agreements, and bailment agreements executed contemporaneously concerning the same motor vehicles should be construed as one integrated contract.

Similarly, Plaintiffs argued that Florida Statutes Sections 520.07(7) and 520.13 void the bailment agreements because the bailment agreements were not signed first by Bill Heard. This Court finds this argument unpersuasive. Following Plaintiffs argument to its logical conclusion then all the agreements in this case would have been void, including the agreement that in Bragg's case gave him title to his truck.

[15] The purchase agreements provided that Bill Heard retained title pending credit approval. *See* Compl. Exs. A-1, A-5, A-6, B-1. Moreover, the purchase agreements provided that ". . . Seller agrees to sell the

Florida contract law recognizes that parties can condition formation of a contract on the occurrence of an event. *See. e.g., Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla. 3d DCA 1958) (holding similar financing condition in automobile purchase agreement a condition precedent); 777 *Flagler Co. v. Amerifirst Bank*, 559 So. 2d 1210,1211 (Fla. 4th DCA 1990) (concluding contract not formed when condition precedent, agreeing to exhibits by specified date, not accomplished); *Zepfler v. Neandross*, 497 So.2d 901, 902-03 (Fla. 4th DCA 1986) (holding condition precedent not satisfied when financing arranged higher than cap); *Curry v. Security Life and Trust Co.*, 187 So. 2d 906, 907 (Fla. 2d DCA 1966) (concluding insurance contract not binding until condition precedent met).[16] The UCC is silent on the effect of conditions precedent on the formation of a contract. Therefore, Florida contract law on conditions precedent supplements Section 672.204.

Turning to the Complaint, Bragg and Crabtree's alleged TILA violations did not occur in a transaction that was consummated.[17] In Crabtree's case, financing was never

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designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser, provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." *See id.* (emphasis added). The bailment agreements contained similar provisions and incorporate the purchase agreements and RISCs by reference.

[16] *See. e.g., also Wickenheiser v. Ramm Vending Promotion. Inc.*, 560 So. 2d 350, 352 (Fla. 5th DCA 1990) (stating that evidence of oral condition precedent admissible to show no distributorship agreement existed even though written executed agreement existed); Ketchian v. Concannon, 435 So. 2d 394, 395 (Fla. 5th DCA 1983) (holding same in reprds to promissory note); Beach Kevs. Inc. v. Girvin, 213 So. 2d 3 14, 315-16 (Fla. 1st DCA 1968) (holding evidence of oral condition precedent admissible to show executed mortgage not effective).

[17] The only binding agreement between either Bragg or Crabtree and Bill Heard at the time of signing was the bailment agreements. This court

approved and he returned the new car and Bill Heard returned his trade-in and down payment. *See* Compl. ¶ 40. In Bragg's case, he did not purchase VTR, SAP,[18] or GAP in the

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has previously concluded that the bailment agreements were interim rental agreements under which Bragg and Crabtree got immediate possession of new motor vehicles pending approval of their respective RISCs. In exchange for the bailment agreement, Bragg and Crabtree each signed purchase agreements, IIISCs, made down payments, and left their trade-in.

Taking possession of the new motor vehicle, making a down payment, and leaving a trade-in at the dealership are not inconsistent with the purchase agreement not being consummated. If Bill Heard could not obtain financing at the rates provided for in the RISCs, the parties could either enter into a new purchase agreement (or EIISC) or the Plaintiffs could obtain their down payment and trade-in back (or its value) and walk away. This is exactly what happened to Crabtree.

[18] Without explanation in Footnote 20 of their brief, Plaintiffs indicate that Bill Heard purchased and enrolled Bragg into the SAP program without charge to Bragg. First, this fact was not pled in the Complaint. Second, the Court is unsure how this fact could possibly create a cause of action for Bragg. At oral argument, Plaintiff Bragg indicated that it would not create a cause of action.

Moreover, the purchase agreement that consummated Bragg's transaction clearly struck out and did not charge Bragg for VTR protection. *See* Compl. Ex. A-6. Further, the selling price of the vehicle (excluding items like SAP, VTR, and GAP) actually decreased from the original proposed transaction, *see* Compl. Ex. A-1, to the final transaction by over $200 (not to mention the $199.00 that was not charged for VTR). *See* Compl. Ex. A-6. This would seem to undermine any basis against Bill Heard for hiding finance charges in the selling price.

At oral argument Plaintiffs, instead, contend that, if this Court were to find the condition a condition precedent, then the Court would have to reinstate their previously dismissed estimates claim. This Court concludes that finding the condition to be a condition precedent has no effect on its prior ruling. In the Court's prior order (Dk. #35), the Court specifically considered the conditional nature of the parties agreements in this case and found that a conditional agreement does not make the annual percentage rate an estimate. The Court did not condition its analysis on the condition created by the estimate. This Court's prior order did not

transaction that was finalized and assigned to Triad. *See id.* Exs. A-6, A-9.

In addition to Florida law, this Court believes that the case law developed in this area supports this Court's ruling. The cases on this subject can be divided into two categories.

The first category involve cases, like this one, where the parties have conditioned contract formation on the occurrence of an event. In those cases, courts have concluded the transaction not consummated and TILA not violated. *Clark v. Trov and Nichols, Inc.*, 864 F 2 d 1261, 1264 (5th Cir. 1989) (concluding that consummation did not occur after the parties signed a rate lock in agreement because the lender conditioned the agreement to credit investigation and approval); *Jackson v. Grant*, 890 F.2d 118, 120-21 (9th Cir. 1989) (holding that consummation of a real estate loan did not occur when the agreement was conditioned upon the finding of a lender to finance the transaction); *Baxter v. Sparks Oldsmobile. Inc.*, 579 F.2d 863, 864 (4th Cir. 1978) (concluding, in a case where the contract contained a condition precedent for financing approval, that TILA did not apply because no binding contract existed); *Hodges v. Koons Buick Pontiac GMC. Inc.*, 180 F. Supp. 2d 786, 792-93 (E.D. Va. 2001) (holding that an unfunded RISC was irrelevant to and did not create a basis for TILA liability).[19]

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restrict its analysis to any specific type of condition.

[19] In *Hodges*, the plaintiff financed the purchase of a used Grand Am. *See id.* at 789. The original RISC and purchase agreement allegedly contained a violation of TILA. *See id.* at 791-92. After not being able to obtain funding, a second separate purchase agreement and RISC were entered into, approved, and funded. *See id.* at 790-91. The second RISC charged the same fees as the first but gave a corrected disclosure that complied with TILA. *See id.* at 792-93.

Bragg and Crabtree's argument that *Hodges* is distinguishable from the present case because the final RISC in this case did not correct the error under 15 U.S.C. § 1540(b) ignores half the holding that the first RISC was

The second category of cases on when consummation occurs, which includes cases upon which Plaintiffs rely, involves situations where the contract is formed and then found to be unenforceable because of state law or a condition subsequent excuses performance. In those cases, courts have concluded the transaction was consummated and TILA disclosures were due. *See Davis v. Werne*, 673 F.2d 866, 870-71 (5th Cir. 1982) (involving the mutual rescission of a consummated unconditional contract because the dealer was unable to assign the finance contract); Williams v. Public Finance Corp., 598 F. 2d 349, 356 (5th Cir. 1979) (stating fact that Georgia made contract unenforceable did not relieve defendant from TILA disclosure obligations); *Dryden v. Lou Budke's Arrow Finance Co.*, 630 F.2d 611, 645-46 (8th Cir. 1980) (holding that the fact Missouri law invalidated note was irrelevant to TILA disclosure obligations); *Graves v. Tru-Link Fence Co.*, 905 F. Supp. 515, 519-20 (N.D. Ill. 1995) (finding financing condition to be condition subsequent under Illinois law).

The only case cited by Plaintiffs that does not neatly fit into these two categories is *Madewell v. Marrietta Dodge. Inc.*, 506 F. Supp. 286,287-88 (N.D. Ga. 1980). In that case, the dealer did not sign the agreement, the agreement was unconditional on its face, but there was an alleged oral understanding (disputed by the plaintiff) that the contract was not binding until financing was found. *See id.* at 287. The parties subsequently rescinded the contract when financing could not be found. *See id.* In that case, the court did hold that the transaction was consummated as to the consumer, and therefore disclosures had to be made. *See id.* at 288-89. The court did not mention or discuss Georgia contract law, as required under TILA, or whether the oral contract was a condition precedent to contract formation. It appears the court

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"irrelevant" because the transaction was not funded.

chose not to believe the alleged oral understanding and instead found that the parties had, in effect, undone a completed transaction by rescission. *Madewell*, then, is inapposite to the current situation because Bragg and Crabtree never rescinded an already consummated transaction.

Because the purchase agreements and RISCs that allegedly violate TILA contain a condition precedent that was not satisfied, neither Brags nor Crabtree consummated a transaction under Florida law. Accordingly, Bill Heard's Motion to Dismiss is granted with prejudice as to Count I of the Complaint.

B. *State Law Claims*

Because the Court has resolved Plaintiffs' federal claim, only Plaintiffs' state law claims remain in this action. This Court may decline to exercise supplemental jurisdiction over state law claims where it has dismissed all the underlying federal claims. *See* 28 U.S.C. § 1367(c)(3). In making this determination the court is to consider factors such as "comity, judicial economy, convenience, fairness, and the like." *Crosby. Paulk*, 187 F.3d 1339, 13 52 (11th Cir. 1999). Although this decision is discretionary, dismissal of state law claims is strongly encouraged where the federal claims are dismissed prior to trial. *See Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1353 (11th Cir. 1997). Where the court declines to exercise supplemental jurisdiction over such claims, the remaining state law claims should be dismissed without prejudice so that they can be re-filed in the appropriate state court. *See Crosby*, 187 F.3d at 1352. In the interest of judicial economy and convenience, the Court declines to exercise supplemental jurisdiction over the remaining state law claims in this action. Accordingly, Defendants Motions to Dismiss (Dkts. #44, 45, 46, 47, 48, 49) are denied without prejudice to bringing them in state court.

C. *Motions for More Particular Statement*

Because this court is declining to exercise supplemental jurisdiction over Plaintiffs remaining state law claims and dismissing Plaintiffs Complaint without prejudice, this Court need not reach Defendants' motions for more particular statement. Accordingly, Defendants Motions for a More Particular Statement are denied as moot.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant Bill Heard's Motion to Dismiss (Dkts. #44, 45) is GRANTED in part with prejudice and DENIED in part without prejudice as set forth herein.

3 Defendants AFC, Triad, and WFS' motions to dismiss (Dkts. 46, 47, 48, 49) are DENIED without prejudice to bringing them in state court.

3. Defendants motions for a more particular statement (Dkts. 44, 45, 46, 47, 48, 49) are DENIED as moot.

4. The Clerk is directed to close the file and terminate all pending motions.

DONE AND ORDERED in Chambers at Tampa, Florida, on 24 day of January, 2003.

/s/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

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Courtroom Deputy
Law Clerk

(2)

No. 04-417

FILED
DEC 17 2004

In The

Supreme Court of the United States

BILL HEARD CHEVROLET, INC. – PLANT CITY,

Petitioner,

v.

RANDAL S. BRAGG, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Truth in Lending Act ("TILA") and Treasury Regulation Z require a creditor to make disclosures to a consumer *before* credit is extended, *i.e.*, before a *consumer* "consummates" a credit transaction so that the consumer can be informed and compare competing offers of credit from creditors. Federal Reserve Board commentary provides that state law should govern when a consumer becomes contractually obligated to a credit transaction. The question presented is:

Whether under TILA and Florida law, a creditor must comply with the TILA disclosure requirements prior to the time the consumer signs the contract, where the contract is unconditional on its face, states that any changes must be in writing, and that the creditor must sign such changes, and where the creditor did not sign certain other documents purporting to create a credit transaction conditional on the creditor's ability to later assign the contract to a third-party lender.

LIST OF PARTIES TO THE PROCEEDINGS

The Respondents, who were plaintiffs/appellants below, are Randal S. Bragg, Robert I. Crabtree, Christopher E. Nichols, Bond Nichols, Andre E. Reichert, Nonie Stebbins, Donald E. Stebbins and John E. Cone. The Petitioner is Bill Heard Chevrolet-Plant City whose parent corporation is Bill Heard Enterprises. Other defendants in the district court were Affiliated Financial Corporation, Triad Financial Corporation, and WFS Financial Incorporated.

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INTRODUCTION

There is no compelling reason for this Court to grant certiorari in this case. The sole reason asserted by Petitioner Bill Heard Chevrolet – Plant City ("Bill Heard") is that the Eleventh Circuit's decision conflicts with this Court's decision in *Ford Motor Credit Company v. Milhollin*, 444 U.S. 555 (1980). In fact, the two cases address different issues and are in no way in conflict. Although Bill Heard argues that the decision below is inconsistent with one principle stated in *Milhollin*, the Eleventh Circuit cited and properly applied that principle.

Moreover, there is no split of authority between the courts of appeals on the issue presented. The only two circuits that have ruled on it – the Fourth and Eleventh – have both agreed that a car buyer consummates a credit transaction when the buyer executes a credit contract with the seller/creditor, even if the contract purports to contain an unsatisfied condition precedent that the seller be able to later successfully assign the contract to a third-party lender on the same terms and conditions.

Finally, the Eleventh Circuit's decision is correct. Even where a credit contract expressly contains a condition precedent that the seller/creditor be able to successfully assign the contract to a third-party lender (and the credit contracts in this case did *not* contain such a condition), the buyer consummates his or her credit transaction, requiring that TILA disclosures must have already been given to the buyer, when the buyer signs the contract. This holding is supported by TILA, Regulation Z, and Florida contract law. In any event, it is undisputed that Bill Heard never gave all of the pertinent TILA disclosures to the buyer at *any* time – much less prior the buyer executing

the credit contracts. Thus, Respondent, Randall Bragg ("Bragg") stated a valid TILA claim.

STATEMENT

A. The Facts[1]

Bill Heard is licensed in Florida as a motor vehicle dealer and a motor vehicle retail installment seller. Mr. Bragg visited Bill Heard on September 28, 2001, and decided to purchase a new 2002 Chevrolet Silverado truck. He paid a $600 down payment and traded in his 1994 Ford Escort, valued by Bill Heard at $500. At that time, Mr. Bragg signed one of Bill Heard's standard purchase contracts ("Purchase Contract #1") and two of Bill Heard's standard Retail Installment Sale Contract Simple Finance Charge contracts ("RISC #1" and "RISC #2").[2] Bill Heard did not sign any of these three contracts.

Purchase Contract #1 listed the sales price of the truck as $19,253.34 plus charges for two property insurance products: $399.00 for a Silencer Alarm ("SAP") and $199 for Vehicle Theft Registration ("VTR"). Both of the RISCs also included $495 for insurance and debt cancellation coverage ("GAP"). Bill Heard included the charges for VTR, SAP and GAP in the cash price, which price was incorporated into the RISCs in the "amount financed." RE-38-6-8 & Exh. A2, A3.

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[1] Except where citations are given, all procedural history and facts in this Statement come from the court of appeal's decision that is located in Petitioner's Appendix ("Pet. App.") A at 1a-14a and is reported at 374 F.3d 1060.

[2] *See* Appellant's Record Excerpts ("RE") RE-38 Exh. A1, A2, A3.

Under 15 U.S.C. § 1605(c) and 12 C.F.R. §§ 226.4(d)(2), (3)(i), Bill Heard was required to make certain disclosures concerning VTR, SAP and GAP.[3] However, nowhere on Purchase Contract #1, RISC #1, RISC #2, or on the SAP, VTR or GAP forms, did Bill Heard make all of the required disclosures.[4]

Bill Heard argued below and in its Petition that Bragg's credit transaction was a "conditional credit transaction." *See, e.g.*, Petition at i. The two RISCs on their faces are expressly unconditional, however. RE-A-2. They state in part: "By signing this contract you choose *to buy* the vehicle on credit under the terms on the front and back of this contract. You *agree to pay* Creditor-Seller (Bill Heard) . . . the Amount Financed and Finance Charge according to the payment schedule below." *Id.* (Emphasis added; hereafter all emphasis is added unless noted otherwise). Under a heading entitled "No Cooling Off Period," the RISCs state: "State law does not provide for a 'cooling off' or cancellation period for this sale. After *you sign this contract*, you may cancel it if the seller agrees or for legal cause." *Id.* Under a heading entitled "How This Contract Can Be Changed," the RISCs state: "This contract contains the entire agreement between you and us

[3] For VTR and SAP, the dealer must disclose that (1) this insurance coverage is not required; (2) if the insurance is purchased from the dealer – what the premium for the initial term is; and (3) if the term of insurance is less than the term of the transaction, what the term of insurance is. For GAP, the dealer must also make these three disclosures, and in addition, the consumer must sign or initial a written request for the insurance after receiving the disclosures.

[4] RE-38-6-10 & Exh. A2, A3, A10, A11, A12. Bill Heard made none of the three disclosures for VTR and SAP made only one of the three required disclosures for GAP on the GAP form (Exh. A10).

relating to this contract. Any change to this contract must be in writing and *we must sign it*." *Id.* Right above the block where Mr. Bragg signed them, the RISCs state: "You *agree* to the terms of this contract and confirm that you received a completely filled in copy when you signed it." *Id.*

On the same date that Mr. Bragg signed these contracts, he also signed a document entitled Bailment Agreement for Vehicle Spot Delivery ("Bailment Agreement"). *See* RE-38, Exh. A4; RE-A-4. That document permitted Mr. Bragg to take possession of the new truck on that date. The Bailment Agreement stated in part: "This Agreement is attached to and forms a part of that certain *sales* agreement between Dealer *listed below* and the undersigned buyer(s) and concerns the vehicle listed above." *Id.* Although the document listed the Silverado truck, it did not list the Dealer – Bill Heard, and it did not specifically refer to and describe Purchase Agreement #1, RISC #1 or RISC #2. And again, Bill Heard did not sign this document. *Id.* The Bailment Agreement purported to characterize the purchase and credit transaction between Mr. Bragg and Bill Heard as a rental agreement and contained this conditional language: "If Dealer is able to provide Buyer(s) with financing according to the terms of the *Sales* Agreement, said Agreement shall be binding upon Buyer(s) and enforceable by Dealer." *Id.*

Purchase Contract #1 also contained some conditional language stating that "the Seller agrees to sell the designated vehicle . . . provided however, the *designated financial institution* approves Purchaser's request for a loan . . ." RE-38, Exh. A1. Additionally, that contract stated, "Neither party hereto shall be bound to the other until terms of credit have been approved by both parties. . . ."

Neither Purchase Contract #1 nor the two RISCs, however, designated any financial institution. RE-38, Exh. A1 – A3.

On October 1, 2001, Bill Heard contacted Mr. Bragg and asked him to come back and sign additional documents. Mr. Bragg complied and signed two new Purchase Contracts and also two new RISCs ("RISC #3" and "RISC #4"). The financing terms in RISC #3 and RISC #4 were less favorable to Bragg than those in RISC #1 and RISC #2.[5] The two new purchase contracts listed the sales price of the truck at $18,993.00, one included a charge for an extended warranty of $990.00 but neither of the new purchase contracts contained charges for VTR or SAP. All four of these new contracts were backdated by Bill Heard to September 28, 2001, the date of Mr. Bragg's first visit; all four were signed by Mr. Bragg, but none of them were signed by Bill Heard on that date. On October 5, 2001, Bill Heard signed and assigned RISC #4 to Triad Financial Corporation who then issued payment to Bill Heard for $19,982.24. RISC #4 was the only contract between the parties Bill Heard ever signed.

The method by which Bill Heard sold and financed the truck to Mr. Bragg is known in the industry as "spot delivery," a method alleged in the amended complaint to be in violation of Florida's consumer protection laws and public policy. Taken from the allegations of Mr. Bragg's complaint, the Eleventh Circuit described the practice this way:

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[5] *Compare* RISC #1 (APR 14.65%; finance charge $10,937.33; amount financed $21,158.91) and RISC #2 (APR 14.50%; finance charge $10,642.05; amount financed $21,158.91) *with* RISC #3 (APR 14.89%; finance charge $11,699.11; amount financed $22,176.18) and RISC #4 (APR 14.89%; finance charge $11,102.69; amount financed $21,046.09).

> Under "'spot delivery,'" the customer is presented with a Purchase Agreement, RISC and Bailment Agreement. Bill Heard then delivers the car to the customer "on the spot" on the same date that the customer signs the documents, and allows him or her to take the car without passage of title. The customer in return typically makes a cash deposit or trades in an existing vehicle as a down payment. Bragg contends that customers like him are "under the impression they have purchased a car under certain sales and finance terms." On occasion, Bill Heard will notify a customer that it was not able to secure the financing rates agreed to in the documents and ask them to sign new agreements with less favorable financing terms. If a new RISC is executed, the financing terms are calculated from the date of actual delivery of the vehicle to the customer. According to Bragg, Bill Heard never executes the original RISCs. Instead it uses the initial lower financing rates to entice the customers under a "'bait and switch'" scheme. Bragg also asserts that Bill Heard requires forfeiture of the down payment or trade-in vehicle if the customer refuses to accept the new financing terms.

Pet. App. A at 4a.[6]

B. The Proceedings Below

On November 30, 2001, Bragg filed this case against Bill Heard as a class action in state court and alleged five counts: (1) violations of the Truth and Lending Act, 15

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[6] *See also* A. Taub, *Focus on Auto Fraud, Crooked Car Dealers – Some Favorite Tricks*, 10 The Consumer Advocate at 4-5 (Oct.-Dec. 2004).

U.S.C. § 1601, *et seq.* ("TILA"); (2) violations of Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201, *et seq.*; (3) violations of Florida's Motor Vehicle Retail Sales Finance Act, Fla. Stat. §§ 520.01, *et seq.*; (4) unjust enrichment; and (5) declaratory and injunctive relief. The TILA claim alleged among other things that Bill Heard (1) failed to make required TILA disclosures prior to Mr. Bragg's consummation of credit terms; (2) failed to include in the finance charge the charges for insurance products sold in connection with his credit transaction, when it had failed to make required disclosures as a precondition to excluding such charges from the finance charge; and (3) failed to state clearly that the APRs in the first two RISCs were "estimates."

Bill Heard removed the case to federal court and moved to dismiss all of Mr. Bragg's claims under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion in part and denied it in part and granted Mr. Bragg leave to file an amended complaint. Concerning the TILA claim, the district court rejected Bill Heard's argument that the cost of the VTR insurance did not have to be included in the finance charge because it was also charged in cash transactions. RE-35 at 6-10. The Court agreed with Bill Heard's argument on the "estimates" theory of TILA violation, and it granted the motion to dismiss on that ground. *Id.* at 10-16.

Thereafter, Mr. Bragg filed an amended complaint.[7] Bill Heard again moved to dismiss the TILA claim and

[7] The amended complaint dropped the state law claims for unjust enrichment and declaratory and injunctive relief and added a state law claim for restitution of the amounts paid pursuant to an illegal contract, procured by Bill Heard in violation of state consumer protection

(Continued on following page)

asserted, for the first time, that Mr. Bragg had never consummated a credit transaction with it that violated TILA. In deciding the motion, the district court concluded that Bragg never consummated either of the first two RISCs because the Purchase Agreement and Bailment Agreement, which the court concluded it must read together with the unconditional RISCs as a single contract, contained an unsatisfied condition precedent – that neither party was bound until Bill Heard sold one of the RISCs to another lender. The district court dismissed Mr. Bragg's TILA claim with prejudice and declined to exercise supplemental jurisdiction over Bragg's state law claims. RE-77.

Mr. Bragg filed a motion for rehearing and, in response, the district court again held that the first two RISCs were never consummated, that no TILA violation occurred and that no claim could be stated. Pet. App. C at 22a-36a. Mr. Bragg appealed, and in a unanimous opinion, the Eleventh Circuit reversed. Pet. App. A.

To determine when Mr. Bragg consummated his credit transaction, the court first looked to Florida law. While it strongly implied that Florida law would resolve the question in Mr. Bragg's favor, it believed the answer under Florida law was unclear. Pet. App. A at 12a. The court then considered the consequences of the district court's reading of Florida law, TILA and Regulation Z, and stated that such a reading was contrary to TILA's central goal of providing " 'meaningful disclosure of credit terms so that the consumer will be able to compare more readily the

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statutes and Florida's public policy where Bragg was not in pari delicto with Bill Heard.

various credit terms available to him.'" *Id.* at 13a (quoting 15 U.S.C. § 1601(a)). The court stated that under the district court's ruling, a creditor would not have to make the required disclosures to the consumer before he signed a credit contract so long as the disclosures were made at some point prior to the assignment of the loan. The Eleventh Circuit stated that disclosures made after the consumer signed a RISC "are likely to be of little or no value to that consumer" because it would undermine the ability of the consumer to weigh competing offers. *Id.* at 13a. In order to effectuate TILA's main purpose, the court held that even if a financing agreement contains a condition precedent that the seller/creditor be able to later assign a RISC, where the satisfaction of that condition "is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract." *Id.* at 13a-14a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FORD MOTOR CREDIT CO. v. MILHOLLIN.*

Bill Heard's sole basis for seeking certiorari review in this Court is its contention that the Eleventh Circuit's decision conflicts with this Court's decision in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In fact, however, Bill Heard does not argue that the holding below conflicts with *Milhollin*, but that the opinion below did not follow *Milhollin's* direction that courts should defer to commentary construing Federal Reserve regulations. Not only is Bill Heard incorrect to denote this claimed inconsistency a conflict warranting this Court's review, but its

argument that the Eleventh Circuit did not follow this Court's direction is wrong as well.

In *Milhollin*, this Court considered whether TILA "requires that the existence of an acceleration clause always be disclosed on the face of a credit agreement." *Id.* at 557. In considering that question, the Court looked to Federal Reserve staff commentary and noted that, "unless demonstrably irrational, Federal Reserve Board staff opinions construing the [TILA] or Regulation should be dispositive." *Id.* at 565. The Court held that "TILA does not mandate a general rule of disclosure for acceleration clauses." *Id.* at 557.

First, the holding below plainly does not conflict with the holding of *Milhollin*. As the leading treatise on Supreme Court practice notes:

> [T]here must be a real or "intolerable" conflict on the *same matter of law* or fact, not merely an inconsistency . . . in the general principles utilized. . . . A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the *same legal issue* in opposite ways, based on their *holdings* in different cases with very similar facts.

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* at 225, 226 (8th ed. 2002). Bill Heard does not argue that this case presents any such "genuine conflict."

Second, the Eleventh Circuit both cited and followed the statement in *Milhollin* on which Bill Heard's argument is based. Pet. App. A at 9a. Accordingly, to determine when Mr. Bragg became obligated on the credit transaction,

the court of appeals first looked to Florida law. Although it strongly implied that Florida law would resolve the question in favor of Mr. Bragg, the court stated that the answer under Florida law was not clear. *Id.* at 12a. The court then looked to the consequences of the district court's reading of Florida law and Regulation Z, and held that such a reading was "contrary to the central goal of TILA." *Id.* at 13a. Because a contrary result would "undermine" TILA, the court then held that Mr. Bragg consummated his credit transaction when he signed the contract. The court's approach was entirely consistent with this Court's direction in *Milhollin* and presents no basis for this Court's review.

II. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRUITS ON THE QUESTION PRESENTED.

Only two of the courts of appeals have directly ruled on the issue of when consummation of a credit contract occurs where the contract purportedly contains an unsatisfied condition precedent – the Eleventh Circuit in this case, and the Fourth Circuit in *Nigh v. Koons Buick Pontiac, GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, __ U.S. __ (Nov. 30, 2004). Those two circuits came to the same conclusion.

Consistent with these two decisions, the Seventh Circuit, in *Streit v. Fireside Chrysler-Plymouth, Inc.*, 697 F.2d 193 (7th Cir. 1983), although it affirmed a directed verdict for the dealer on another ground, disagreed with the district court's ruling that the buyer never consummated his credit transaction because he never paid the dealer the balance of the downpayment, and with the dealer's argument, (similar to Bill Heard's argument here),

that the credit transaction was not consummated because the dealer never assigned the credit contract to a third-party lender bank. The court held that the buyer did consummate the credit transaction for purposes of TILA:

> We . . . hold that the financing agreement was consummated here. The installment contract, which was between Streit and [the dealer], not Streit and the bank, established a credit obligation, as the language of the contract makes clear: "Buyer agrees to pay to Seller the above Total of Payments in 48 successive monthly installments."

Id. at 196.[8]

District courts have also recognized that consummation occurs when the buyer signs the RISC. *See* Pet. App. A at 10a (citing 5 district court opinions); *see also Martinez v. Rick Case Cars, Inc.*, 278 F. Supp.2d 1371 (S.D. Fla. 2003) (denying motion to dismiss TILA claim where dealer did not make disclosures before the *buyer* signed the contract); *Compton v. Alta Vista Motors, Inc.*, 121 F. Supp.2d 932 (W.D. Va. 2000) (dealer violated TILA by failing to list charge for GAP on RISC which was consummated *once buyer signed it* even though dealer made disclosure in later document); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087 (W.D. Mich. 2000) (buyers became obligated upon signing

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[8] *Streit*, 697 F.2d 193 (following *Davis v. Werne*, 673 F.2d 866 (5th Cir. 1982) (transaction did not become unconsummated because the finance company refused to accept an assignment; post-consummation abandonment of credit contract has no effect upon creditor's liability under TILA), and citing *Dryden v. Lou Budke's Arrow Finance Co.*, 630 F. 641 (8th Cir. 1980) (failure to make disclosures not excused by ultimate unenforceability of credit contract under state law); *Williams v. Public Finance Co.*, 598 F.2d 349 (5th Cir. 1979) (same)).

RISC even though dealer claimed buyers not obligated until it found financing, *i.e.*, assigned RISC); *Daenzer v. Wayland Ford, Inc.*, 2002 WL 1050209 (W.D. Mich. May 7, 2002) (judgment for buyer because no dispute buyer did not receive TILA disclosures before signing RISC); *Terry v. Whitlock*, 102 F. Supp.2d 661 (W.D. Va. 2000) (consummation occurred when buyer signed credit contract, gave trade-in to dealer and took possession of financed car from dealer).[9]

III. THE DECISION BELOW IS CORRECT.

Finally, the decision below is correct. The Eleventh Circuit correctly cited the pertinent provisions of TILA, Regulation Z and the Official Staff Commentary relied on by Bill Heard, and it cited and applied *Milhollin* and the principle that courts should defer to Federal Reserve staff opinions when interpreting TILA and Regulation Z. Pet. App. A at 9a. The court held that consummation can occur even *if* the transaction is unfunded, meaning the RISC contains a condition precedent that the dealer be able to successfully assign the RISC to another lender for two reasons. First, it held that this result is "consistent with Regulation Z's *exclusive* reference to the *consumer's* commitment." Pet. App. A at 10a; *see* 12 C.F.R. § 226.2(a)(13) (consummation occurs at the "time a *consumer* becomes contractually obligated on a credit transaction"). Second, the court held, this result advances TILA's overarching

[9] In an unpublished opinion in *Rosa v. Cutter Pontiac Buick GMC of Waipahu, Inc.*, 2004 WL 1543178 (9th Cir. 2004), the Ninth Circuit affirmed a judgment on the pleadings for a dealer where the buyer never signed a RISC – only a conditional *purchase* contract – and thus no credit transaction had been formed.

purpose of consumer protection, while a contrary result thwarts that purpose. Pet. App. A at 13a. Under the district court's erroneous reading of Regulation Z and Florida law, the Eleventh Circuit stated that a seller would not have to make disclosures before the buyer signed the contract but only at some point before the loan was assigned. *Id.* But disclosures that are given after a buyer signs a RISC, the court held, would be of little or no value to the buyer because it would undermine the buyer's ability to weigh competing offers of credit terms. *Id.* The Eleventh Circuit's decision is consistent with TILA, Regulation Z, and the staff commentary addressing the point in time by which disclosures must be made.

In the end, Bill Heard's complaint is not with the degree of deference that the Eleventh Circuit afforded the staff commentary, but with TILA and Florida law. Although the court below stopped short of deciding the state law issues because only one reading of Florida law was consistent with TILA, Florida law supports the decision below.

First, the RISCs were unconditional on their faces and contained modification clauses providing that they were the entire agreement between the parties and any changes must be in writing signed by both parties. Giving effect to the modification clause as required by Florida law, the

unconditional RISCs should not be construed as conditional credit contracts by reading them together with two documents containing vague conditional language, neither of which was signed by Bill Heard.[10]

Second, under Florida law, the RISCs cannot be read together with the Purchase Contracts and Bailment Agreement as a single conditional contract. Florida law permits such a unification of multiple documents only when each of the documents have been signed by *both* parties.[11] Moreover, since the RISCs neither expressly referred to nor sufficiently described the Purchase Contracts and Bailment Agreement, and since these two documents did not refer to or describe the RISCs, the later documents cannot be interpreted as part of the RISCs. *Quix Snaxx*, 710 So. 2d at 153.

Third, the Purchase Agreements and the Bailment Agreement could not be used to make the RISCs conditional contracts because those first two documents were void ab initio and unenforceable since they were procured by Bill Heard in violation of Florida's consumer protection statutes and public policy, as alleged in the amended complaint under Florida's common law illegality doctrine.[12]

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[10] *Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Brickell Building 1 Holding Co.*, 923 F.2d 810, 813 (11th Cir. 1991) (under Florida law, every part of contract must be given effect).

[11] *Clayton v. Howard Johnson Franchise Systems, Inc.*, 954 F.2d 645, 648 (11th Cir. 1992); *Quix Snaxx, Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d DCA 1998).

[12] *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1989); *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19 (Fla. 1908); *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000); *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (Fla. 4th DCA 2001).

Fourth, under five sections of Florida's version of the Uniform Commercial Code, Mr. Bragg was contractually obligated on the RISCs he executed, even though Bill Heard did not sign them, where Mr. Bragg made a down-payment and a trade in and accepted the truck, and through the conduct of the parties, including Bill Heard's admission in its first motion to dismiss that the first two RISCs were binding and enforceable contracts. *See* Fla. Stat. §§ 672.201(1), (3)(b), (c); 672.204; 672.607.

Finally, the language in the Purchase Agreement and Bailment Agreement (on which the district court relied to read a condition precedent into the RISCs) was ambiguous as a matter of law because it was susceptible to two or more reasonable interpretations and must therefore be construed against the drafter, Bill Heard.[13]

For all these reasons, under Florida law, Mr. Bragg became contractually obligated on the RISCs when he signed them, and thus stated a valid TILA claim for Bill Heard's failure to make the required disclosures concerning VTR, SAP and GAP to him prior to his execution of the RISCs.

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[13] *Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F. 3d 1431, 1439 (11th Cir. 1996); *Lambert v. The Berkley South Condominium Ass'n*, 680 So. 2d 588 (Fla. 4th DCA 1996); *Gorman v. Kelly*, 658 So. 2d 1049, 1052 (Fla. 4th DCA 1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Petitioner,

v.

RANDAL S. BRAGG, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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AMICUS CURIAE BRIEF OF THE FLORIDA AUTOMOBILE DEALERS ASSOCIATION AND THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF GRANTING WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Courts must look to state law to determine when consummation, for purposes of the Truth In Lending Act, takes place?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Randal Bragg, Robert Crabtree, Christopher E. Nichols, Bond Nichols, Nonie Stebbins, Andre Reichert, Donald E. Stebbins, John E. Cone, Bill Heard Chevrolet, Inc.-Plant City, Affiliated Financial Corporation, Triad Financial Corporation and WFS Financial.

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INTEREST OF *AMICUS CURIAE* [1]

For over 80 years, the Florida Automobile Dealers Association ("FADA") and the National Automobile Dealers Association ("NADA") have been serving automobile dealers by providing counsel on legal and regulatory matters, representing dealer interests in the Florida legislature and in

[1] Pursuant to Rule 37.6, the undersigned counsel authored this brief in whole. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Washington, D.C., developing research data on the automobile industry, and providing training and service programs to improve dealership business operations, sales and service practices. They have a direct interest in this appeal as the dealership practice which is the subject of this Brief, known as spot delivery ("Spot Delivery"), has a substantial economic impact upon both automobile dealerships and their customers such that each state should be permitted to determine when the "consummation" of a credit transaction takes place for Truth in Lending Act purposes.

SUMMARY OF ARGUMENT

The practice of Spot Delivery is utilized by automobile dealers throughout Florida (and nationwide) to provide vehicles to consumers before final credit approval for an automobile sales or lease transaction is provided by a lending institution. Third party lending institutions are necessary because dealers generally cannot, due to financial constraints, provide financing to consumers.

As a result, most dealership transactions involve dealership arranged financing. This financing arrangement is generally considered a three party transaction, and works as follows: (a) the dealership and the consumer negotiate a purchase price; (b) the dealership assesses the consumer's credit worthiness and attempts to determine the credit terms that a third party lender would agree to for that particular transaction; (c) the consumer is presented with a retail installment sales contract ("RISC") that discloses such proposed terms; (d) the consumer executes the RISC and executes documentation that would make the transaction subject to credit approval by a third party; (e) the consumer takes delivery of the vehicle; (f) the dealership forwards the transaction information to one or more intended third party lenders to see if they will purchase the RISC from the dealer based on the stated terms within the RISC; (f) if a lender agrees, the RISC is signed by the dealer, assigned to the lender and the lender pays the

dealer for the assignment; and (g) in those instances where the dealership cannot get a third party lender to purchase the RISC and the credit contingency remains unsatisfied, the deal is rescinded and each party is restored to their original position.

Typically, consumers shop for automobiles on nights and weekends when third party lenders are closed. Often times, third party lending approval takes time. Spot delivery allows consumers to take physical possession of a vehicle before the dealer has been able to secure the approval of that third party lending source.

Spot delivery benefits consumers, automobile dealers and lenders. As discussed below, providing an automobile to consumers before final credit approval is obtained simply makes it much easier for consumers to buy, and for dealers to sell, an automobile. The overwhelming majority of automobile purchases in the United States today take place because automobile dealers are able to successfully obtain financing for consumers. Moreover, a significant percentage of these transactions utilize the spot delivery practice. In these circumstances, consumers and automobile dealers have a common goal—a consumer wants to purchase and obtain immediate possession of an automobile while the dealer wants to sell and deliver the automobile to the consumer. Providing consumers with possession of a vehicle pending final credit approval eases this process for all concerned and has been approved by numerous Federal Courts and state legislatures throughout the land. The spot delivery practice is a factor in this case because the issue of when consummation takes place is primarily important to spot delivery transactions; especially those where third party lending approval is not forthcoming and the transaction must be rescinded. Any decision which could be interpreted to impact this long-standing practice would slow commerce and convenience in the automobile sales and leasing industries.

Bragg improperly concluded that Federal law determines when an automobile sales transaction is "consummated" for Truth in Lending Act purposes. It is the time of consummation which dictates when Federally mandated Truth in Lending Act Disclosures must be provided to consumers. The Federal Reserve Board has historically determined that the question of when an automobile sales transaction is "consummated" for Truth in Lending Act purposes should be left to state law.

The Bragg Court's determination that a transaction is "consummated" upon the execution of a Retail Installment Sales Contract by the consumer not only may impede the spot delivery practice, it essentially federalized state contract law by creating an inappropriate Federal standard of when consummation takes place. As discussed below, this issue should have been left by the *Bragg* Court to the states in accordance with the Federal Reserve Board's commentary.

ARGUMENT

I. THE 11TH CIRCUIT COURT OF APPEALS IGNORED THE FEDERAL RESERVE BOARD'S OFFICIAL STAFF COMMENTARY AND STATE LAW WHEN IT HELD THAT A RETAIL INSTALLMENT SALES CONTRACT IS CONSUMMATED WHEN A CUSTOMER SIGNS IT RATHER THAN WHEN FINANCING IS APPROVED BY A LENDING INSTITUTION.

In a Spot Delivery transaction, the buyer takes possession of the vehicle pursuant to financing terms proposed by the dealer which have been agreed upon by the consumer. Consumers have the time to shop for credit terms prior to the time that they sign a RISC. Typically, dealers arrange for financing but do not serve as the actual funding source electing instead to assign the RISC to a lending institution which has approved the consumer for financing. In the event that

financing terms cannot be finalized on the terms initially proposed by the dealer, a consumer is free to walk away from the proposed transaction or agree to a different set of financing terms subsequently approved by a lending institution. In the event that a consumer agrees to the new financing terms, these terms are set out in a new RISC containing all Federally mandated Truth in Lending Act disclosures which are provided to the consumer before the consumer signs the RISC. Normally, a consumer is not obligated to purchase the vehicle on the terms set forth in the RISC unless a lending institution agrees to those terms. A spot delivery sale is used to allow the buyer to take possession of the car before the financing terms are finalized. *See Rucker v. Sheehy Alexandria, Inc.*, 228 F.Supp.2d 711, 713 n.1 (E.D. Va. 2002).

In recent years, spot deliveries have become the norm (although with the internet, pre-approval of credit terms is becoming increasingly popular). The Florida Legislature has approved the concept of spot delivery in enacting F.S. §§ 319.001(8) and 320.60(10), which approves the practice. *See* F.S. §§ 319.001(8) and 320.60(10) (defining differences between "new" and "used" vehicles in recognition that, in certain, limited instances, spot deliveries require a consumer to return a vehicle to the dealership when financing cannot be approved by a lending institution).

The 11th Circuit's decision in *Bragg*, if misconstrued, creates a risk that Spot Delivery will be interpreted as being violative of the Truth in Lending Act. More specifically, before the ink of the *Bragg* decision was dry, attorneys began to cite *Bragg* for the proposition that a RISC, once consummated by virtue of the consumer's signature, was unavoidable and could not be subject to a financing contingency (such as the Bailment Agreement for Vehicle Spot Delivery in the instant action). More importantly, this same theory supports the notion that once consummated (by virtue of the con-

sumer's signature), the dealer is bound to the transaction without regard to whether the dealer assented to those terms and/or signed the RISC and therefore purports to nullify the stated and agreed condition precedent to the RISC.[2] However, these express conditions must be given effect. If not, the economic consequences to automobile dealers could be substantial as dealers (subject to an occasional exception) do not act as the source of funds in automobile sales and lease transactions. Accordingly, automobile sales would suddenly require prior credit approval.

Sometimes lending institutions are able to provide rapid credit approval. This typically occurs for consumers who have very good credit. For consumers whose credit is less than perfect, lenders typically take longer to evaluate a consumer's credit and perform greater background investigation and due diligence. If Spot Delivery were to be interpreted as being violative of TILA, based upon *Bragg*, consumers with poor credit ratings will be the ones who suffer since those consumers will have to wait longer to take possession of a vehicle while third party lenders complete their due diligence. This will require consumers to make multiple trips to the dealership before obtaining possession of a vehicle. Such a

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[2] Consider the following example. A consumer visits a dealership the day after a promotional zero percent interest expires, and presents a compelling basis to get the promotional interest rate. The dealer offers to attempt to get that promotional interest rate and has the consumer sign a RISC with such terms. Clearly, the dealer has not agreed to those terms; yet *Bragg* indicates the transaction was consummated. Either *Bragg* serves to destroy elementary notions of contract law taught in law school that requires a meeting of the minds on all material terms of a contract, or purports to create a parallel consummation analysis under TILA which suddenly obviates a meeting of the minds analysis and requires, instead, only the signature of the consumer before the dealership is bound to the terms of the RISC. The absurdity of this construction is further highlighted when the Court considers the fact that dealerships merely arrange for financing and are not really the funding source.

restriction would actually harm consumers since it would impede their ability to purchase automobiles on nights and weekends when, typically, most individuals are comfortably able to shop for automobiles.

The excuse for this attack on spot delivery practices by consumer lawyers is a direct result of the 11th Circuit decision in *Bragg* to ignore the unambiguous commentary of the Federal Reserve Board which interprets the Truth in Lending Act's definition of "consummation". The Federal Reserve Board indicates that "consummation" of a credit transaction occurs when a consumer becomes "contractually obligated on a credit transaction." *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill.). The Federal Courts have interpreted this phrase in accordance with state law. *Nash v. Financial Savings and Loan Association*, 703 F.2d 233 (7th Cir. 1983). Only when a consumer is approved for financing is when TILA's disclosure requirements are (and should be) triggered.

Now, under *Bragg*, there is a potential argument that TILA requirements will be triggered simply upon the consumer's execution of a RISC containing proposed credit terms. These disclosure requirements will have the natural impact of limiting Spot Delivery sales thereby impeding the free flow of commerce between consumers and dealers and making the process a lot more difficult for consumers who come to dealers seeking assistance with financing.

TILA requires that the RISC provide accurate disclosures of credit terms to consumers before "credit is extended" or before "consummation of the transaction" takes place 15 U.S.C. Sec. 1638(b)(1); 12 C.F.R. Sec. 226.17(b). TILA liability cannot accrue until a credit transaction is "consummated". *Baxter v. Sparks Oldsmobile, Inc.*, 579 F.2d 863, 864 (4th Cir. 1978). Consummation is defined as the time "the consumer becomes obligated on a credit transaction." 12 C.F.R. 226.2(a)(13). The determination of whether or when a

party becomes contractually obligated is a question of state law. Official Staff Commentary Sec 226.2(a)(13).

The Retail Purchase Contract signed by Bragg provides:

> the execution of this agreement to purchase is an expression of good faith and contractual obligation on the part of the seller as well the purchaser, in that the seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by the purchaser, provided however, the designated financial institution approves purchaser's application for a loan equal to the amount of a note to be executed by the purchaser * * * in the event this is a sale on credit, neither party hereto shall be bound until terms of credit have been approved by both parties.

Similarly, the Bailment Agreement for Vehicle Spot Delivery signed by Bragg provides in relevant part that "pending credit approval by lending institution and completion of sales transaction. . . delivery of said vehicle by dealer is hereby made to buyer(s) as a convenience to buyer(s), and is subject to all terms and conditions in said sales agreement, if any, executed concurrently or in accordance therewith. . . said vehicle shall remain the property of the dealer."

Under Florida law, a condition precedent is defined as one which calls for the performance of some act or happening of some event after a contract is entered into, and upon the performance or happening of which its obligation is made to depend. *FDIC v. Coleman*, 611 So.2d 1300, 1302 (Fla. 3d DCA 1993); *Cohen v. Rothman*, 127 So.2d 143, 147 (Fla. 3d DCA 1961). Since the text of Bragg's contract made the sale conditioned upon financing approval by a third party lender, the transaction was not consummated until the satisfaction of the condition precedent (i.e., third party lending approval). Because the contracts about which Bragg complained were

never funded by a lending institution, the credit transactions were never consummated under Florida state law.

As a matter of public policy, the determination of when consummation occurs for TILA purposes should be left to the individual states as the Federal Reserve originally contemplated. Not only does *Bragg* purport to apply a Federal standard to the definition of "consummation", the *Bragg* Court actually applies the wrong standard. There is nothing in Federal law that provides that "consummation" of a consumer credit transaction occurs for TILA purposes as soon as a customer signs a RISC as the *Bragg* Court seems to suggest. Instead, the Federal Reserve wisely chose to leave this issue to the states since, when a party becomes obligated on a contract, is almost always determined by state law. *See*, e.g., *Nash,* 728 F.2d at 720. *Bragg* purports to federalize this important area of contract law under the guise of interpreting TILA. This Court should reject that approach.

TILA was designed to regulate the disclosure of credit terms to consumers, not to Federalize contract law. In the *Bragg* context, Florida law amply covered the issue of when a consumer becomes contractually obligated on a credit transaction on the occurrence of an event. *See*, e.g, *Huskamp Motor Co. v. Hebden*, 104 So.2d 96 (Fla. 3d DCA 1958); *777 Flagler Co. v. Amerifirst Bank*, 559 So.2d 1210 (Fla. 4th DCA 1990). A Federal Court does not have the authority to Federalize the issue of when two private parties to a contract become contractually obligated. *See* e.g., *Najieb v. Chrysler-Plymouth*, 2002 WL 31906466 (N.D.Ill. 2002); and *Baxter v. Sparks Oldsmobile, Inc.*579 F.2d 863, 864 (4th Cir. 1978).

Prior to 1982, Regulation Z had defined "consummation" as the time when a creditor agrees to extend credit and the customer agrees to utilize that credit. 12 C.F.R. § 226.2 (kk) (1982); *Nash v. Financial Savings and Loan Association*, 703 F.2d 233, 238 (7th Cir. 1983). In 1982, Regulation Z redefined "consummation" resulting in a "significant departure"

from the previous definition, because under the previous definition, courts were to look at the point in time that the consumer first suffered economic coercion to obtain financeing. *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill.). Under the new, revised definition, this coercion is omitted, and focuses consummation to the point in time that the consumer becomes contractually obligated on the credit transaction. Thus, the duty to disclose does not arise at the time of the underlying purchase; rather, the creditor need disclose only before the consumer is contractually obligated on the credit transaction. *Id*; *46 Fed Reg. 20851 (April 7, 1981).* Courts are to look at state law to determine the point in time that the consumer became contractually obligated. *Id.*

While the 11th Circuit recognized the revised Regulation Z, it did not recognize that it was relying on case law interpreting the outdated version. It found that:

> Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13). However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction in to be characterized for [TILA] purposes"; that question is governed by federal law. *Cody*, 606 F.2d at 505.

Bragg at 1065-1066.

The 11th Circuit's reliance on *Cody* is misplaced. The 11th Circuit did not recognize that *Cody* was decided before the 1982 changes to Regulation Z and before the Official Staff Commentary which require that courts look to state law to determine the point in time that a consumer becomes contractually obligated.

Unfortunately, the *Bragg* decision has already been used for the notion that the spot delivery practice allegedly

becomes unlawful upon the consumer's execution of the RISC. This is the result of a strained conclusion drawn from *Bragg*'s reliance on *Cody*, where *Bragg* found that:

> Given the strong remedial purpose of TILA and continual admonitions that we construe TILA and Regulation Z liberally in the consumer's favor, *see, e.g Cody*, 606 F.2d at 505, we cannot accept the district court's interpretation of Regulation Z, as it would undermine the ability of prospective consumers of credit to weigh competing offers.

Bragg at 1067.

This analysis is flawed. Spot delivery does not run afoul of the often stated purpose of TILA to permit consumers to shop around for credit terms before consummation. Notwithstanding the *Bragg* decision's interpretation of "consummation", a prospective consumer has every opportunity to weigh competing offers before the consumer signs the RISC. Once a consumer receives a proposed RISC from a dealer, a consumer is not obligated to sign the RISC at that moment. Rather, a consumer is free to take the RISC, with all of the proposed credit terms disclosed on it, to another dealer or to a third party lender to compare prices. Therefore, for practical purposes, TILA disclosures are made before the consumer executes the RISC as the disclosures are contained within the RISC itself. Moreover, should the RISC be rescinded by virtue of the inability to satisfy the financing contingency, and should the buyer and the dealer negotiate different terms (presumably terms that will pass lender scrutiny), the buyer can again, prior to executing the second RISC, take those credit terms to another lender to obtain competitive pricing. This comports with the purpose of TILA which is to promote the informed use of credit by consumers. Simply put, the spot delivery practice does not violate TILA. *Janikowski v. Lynch Ford, Inc.*, 210 F.3d 765, 769 (7th Cir. 2000).

CONCLUSION

Spot Delivery is a great benefit to consumers because it allows them to take immediate delivery of a vehicle, often on a weekend or other time outside of normal banking hours. To protect themselves, dealers lawfully enter into bailment agreements with customers to require the return of the vehicle if the proposed financing terms cannot be finalized.

The Appellate Court's ruling is in direct contradiction to the Staff Commentary of Regulation Z. The Petitioner's Petition for Writ of Certiorari should be granted.

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